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V.









A TREATISE  
ON THE  
LAW OF EMINENT DOMAIN

IN THE  
UNITED STATES

BY  
JOHN LEWIS

SECOND EDITION  
VOLUME I.

CHICAGO  
CALLAGHAN & COMPANY  
1900



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## PREFACE TO SECOND EDITION.

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In the twelve years which have elapsed since the publication of the first edition, more decisions have been handed down on the subject of Eminent Domain than in all the previous history of the country. The same plan has been pursued, as in the former edition, of making the citations exhaustive. One hundred and ninety-two new sections have been added and the number and extent of the notes has, probably, been doubled. Half the increase in the size of the work will be found in the seven chapters which treat distinctively of constitutional questions.

In the preface to the former edition a list was given, showing the number of cases cited from each State. For the sake of comparison a similar list is subjoined, in which are included England, Canada, the Territories and Federal courts. The total number of cases cited is 12,822.

New York.....	1,728	England .....	245
Pennsylvania .....	1,347	New Hampshire...	228
Illinois .....	890	Kentucky .....	213
Massachusetts .....	809	Connecticut .....	208
Indiana .....	652	Nebraska .....	207
Missouri .....	532	Texas .....	198
New Jersey.....	529	Georgia .....	196
Iowa .....	410	North Carolina...	183
Federal Courts....	380	Louisiana .....	161
Michigan .....	356	Alabama .....	156
Minnesota .....	356	Maryland .....	156
Maine .....	327	Vermont .....	135
Wisconsin .....	305	Canada .....	108
California .....	295	Virginia .....	102
Ohio .....	277	Tennessee .....	96
Kansas .....	250	Mississippi .....	87

Colorado .....	85	Montana .....	22
South Carolina.....	85	Nevada .....	16
Arkansas .....	81	South Dakota.....	15
Oregon .....	75	Utah .....	11
Washington .....	68	Idaho .....	6
Rhode Island.....	67	North Dakota.....	6
West Virginia.....	64	Dakota Territory...	2
Delaware .....	35	Wyoming .....	2
Florida .....	32	New Mexico.....	1
District of Columbia	26	Oklahoma .....	1

The notes in the present edition have been numbered in successive series of 1 to 99, instead of in a separate series for each section as in the old edition. This accomplishes the same purpose of enabling a reference to be made to any note of any section, and at the same time economises space.

JOHN LEWIS.

Chicago, August, 1900.



## PREFACE TO FIRST EDITION.

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The work, which is now offered to the Profession and the Public, was commenced fourteen years ago and has been prosecuted with as much assiduity as the increasing demands of professional life would permit. Within that time the number of reported cases upon the subject treated has doubled; and, what is of greater moment, decisions of vast importance and far-reaching consequence have been rendered, which will, if they have not already, produce radical changes in many of the legal aspects of the subject.

Great attention has been paid to the constitutional side of the question, and nearly half the book is occupied with a discussion of the proper interpretation of the words "taken," "public use" and "just compensation," as used in the constitutions of the several States. The manner in which this part of the subject has been treated will be best ascertained by an examination of the work itself, but a few words of explanation may not be improper. Very early in the preparation of the work the writer became convinced that the earlier cases as to what constitutes a taking were based upon a radically defective interpretation of the constitution, which not only denied the right to compensation in many cases where it ought to be given, but greatly embarrassed the property-owner in obtaining it in those cases in which it was conceded to be due. These early cases attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*. It is only by having a clear and correct conception of the idea of *property* that a uniform, consistent and just application of the constitution can be made to the many complicated and varied cases which come up for adjudication. It seems to the writer that the principles elaborated in the third chapter, and which are supported by a constantly increas-

ing weight of authority, will enable such an application to be made.

The chapter on the meaning of the words "public use," is written upon the assumption, which accords with all the authorities, that the words import a limitation upon the power of the legislature. Conceding this to be the intent of the words, whether the conclusions reached by the author are correct must be left for the reader to judge. They have been reached after years of consideration and the gradual resolution of many doubts and questions. One doubt concerning the matter, however, remains, and that is, whether the words in question were originally intended to operate as a limitation at all. The language of the provision does not indicate it. "Private property shall not be taken for public use without just compensation." If the intent had been to make the words, *public use*, a limitation, the natural form of expression would have been: "Private property shall not be taken *except* for public use, nor without just compensation." It is certainly questionable whether anything more was intended by the provision in question than as though it read, "Private property shall not be taken *under the power of eminent domain* without just compensation." Those cases which virtually give this interpretation to the provision and at the same time hold that the words, public use, are a limitation, it seems to the author are not logically sound. In some of the States the form of the provision is such as to leave no room for doubt that a limitation was intended.

It is unnecessary to comment upon that part of the work which treats of "just compensation," or upon what has been written concerning the effect of the constitutional provision as a whole.

The author has endeavored to make the citation of authorities exhaustive, and hence numerous cases are sometimes referred to in support of propositions which are not disputed. While this may seem unnecessary, it leads to no confusion and the advantage is gained of having substantially all the authorities at hand upon a given point when desired for any purpose.

Over six thousand cases are referred to, and the comparative extent to which each State contributes to the number might be made the subject of an interesting commentary, when it is remembered that they are an indication of material progress and of public improvements, but perhaps most can be said in the fewest words by giving the list itself and leaving the reader to his own reflections:

New York.....	830	Kansas .....	88
Massachusetts .....	599	Georgia .....	87
Pennsylvania .....	534	North Carolina.....	83
Illinois .....	377	Maryland .....	81
Indiana .....	366	Tennessee .....	67
New Jersey.....	338	Virginia .....	65
Iowa .....	259	Alabama .....	63
Missouri .....	232	Texas .....	61
Maine .....	215	Nebraska .....	54
Wisconsin .....	208	Mississippi .....	44
New Hampshire....	186	Arkansas .....	43
Ohio .....	171	South Carolina.....	43
Michigan .....	169	West Virginia.....	34
Minnesota .....	159	Rhode Island.....	29
Kentucky .....	139	Oregon .....	26
California .....	135	Delaware .....	19
Connecticut .....	133	Colorado .....	14
Louisiana .....	98	Nevada .....	12
Vermont .....	98	Florida .....	6

The plan has been adopted of numbering the notes of each section consecutively, and in order to prevent confusion the notes of each section are headed by the number of the section to which they belong. This plan is believed by the author to be the most convenient for citation and reference, and advantage has been taken of it to refer, in the table of cases, to the particular note or notes in which each case appears.

JOHN LEWIS.

Chicago. June, 1888.





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# EMINENT DOMAIN.

## CHAPTER I.

### THE POWER DEFINED AND DISTINGUISHED.

§ 1. **The power defined.**—Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the general welfare.<sup>1</sup> It embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the State itself or by a corporation, public or private, or by a private

<sup>1</sup> The phrase eminent domain has received a great variety of definitions. "It is defined to be that dominium eminens, or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use in those great public emergencies which can reasonably be met in no other way." 1 Redfield on Railroads, p. 228. "The right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use." Dillon on Municipal Corporations, §584 (453). "It is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and

control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." Cooley, Const. Lims. p 524. "The power of the sovereign to condemn private property for public use." Mills on Em. Dom. §1. "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain." Vattel, b. 1, c. 20, §244. The same definition is adopted by the court in Pollard's Lessee v. Hogan, 3 How. 223. And see Geizy v. C. & W. R. R. Co., 4 Ohio St. 308; Orr v. Quimby, 54 N. H. 590, 611; Lake Merced Water Co. v. Cowles, 31 Cal. 215; The Boston and Roxbury Mill Co. v. Newman, 12 Pick. 467; Todd v. Aus-

citizen.<sup>2</sup> Apart from constitutional considerations, it is **not** essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature. It is sufficient that the use of the particular property for the purpose proposed is necessary to enable individual proprietors to cultivate and improve their land to the best advantage or to develop certain natural and exceptional resources incident thereto, such as a water privilege or a mine. In such cases the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country. Doubtless the definitions which restrict eminent domain to a taking for public use have been inspired by the constitutional provisions which prevail in the United States and impose this limitation on the exercise of the power.<sup>3</sup>

§ 2. **Definitions considered.**—From the definitions cited in the foregoing section, it will be seen that some writers and jurists have given to the phrase *eminent domain* a more extended signification than the one above laid down. Thus Judge Cooley defines it as “the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.”<sup>4</sup> No court

tin, 34 Conn. 78; Forney v. Fremont, etc., R. R. Co., 23 Neb. 465, 36 N. W. Rep. 806; Groff v. Turnpike Co., 128 Pa. St. 621, 18 Atl. Rep. 431; Cherokee Nation v. So. Kans. R. R. Co., 33 Fed. Rep. 900. “The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation.” People v. Adirondack R. R. Co., 160 N. Y. 225, 237.

<sup>2</sup> Adopted by the court in Con-

sumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. Rep. 1062.

<sup>3</sup> We should say that Mr. Mill's definition is, for this reason, too narrow. Some States have, by constitutional provisions, authorized the taking of private property for private use in cases where the general welfare will thereby be promoted. This is as much an exercise of the power of eminent domain as the taking for a railroad or street.

<sup>4</sup> Cooley, Const. Lims. 524; and

has ever referred either the control and regulation of rights of a public nature or of individual property to the power of eminent domain, and Judge Cooley himself treats of these matters, not under the head of eminent domain, but under the head of the police power. This enlarged definition finds sanction in the works of many theoretical writers and in the dicta of various judicial opinions, but, however well sanctioned, it is certainly objectionable; first, because it does not correspond to the practical application of the term, and, second, because it invests the term with a certain vagueness and elasticity, that preclude the formation of any definite conception. All exercises of sovereign power over private property, which have been judicially determined to fall under the right of eminent domain, have been cases in which there has been an appropriation of such property to particular uses.

The rights and powers which the State has in, or over, public property may be classified under a few heads, as follows:

First. The State may possess property in its individual or organic capacity which it holds for sale or profit, and in which the people distributively have no right whatsoever. In respect to property of this sort, the State stands in the same relation as any citizen to the property he possesses, and may use, enjoy, control and dispose of it in the same manner.

Second. The State possesses property of a public nature, such as forts, arsenals, public buildings and the like, which is employed for defense, or the transaction of the public business and affairs. In this class of property, also, individual citizens have no rights, and are only entitled to use it as they have dealings with the government, and then only subject to such regulations as the government may see fit to establish. The State can dispose of this property at pleasure, subject to such limitations as attached to its rights in the property at the time of its acquisition.

see *Dyer v. Tuscaloosa Bridge* well Matter, 2 Nisi Prius Rep.  
Co., 2 Porter (Ala.) 296; Hart- (Mich.) 97.



Third. The State possesses property which it holds as trustee for the public, such as navigable waters, highways and the like. This class of property is exclusively for the public use, and the State, as the only representative of the public, may be said to be invested with the title thereto. The State may control and regulate the use of such property as the public welfare may demand, but cannot rightfully deprive any part of the public of the privilege of such use.

All property under the control of the State will be found to fall into one of these classes, and all acts of the State in respect to these classes of property may be referred, either to the right of proprietorship, the right of police regulation, or the general power of a State to do all such acts as are necessary for the public safety or conducive to the public good; none of such acts can properly be referred to the power of eminent domain.

If we turn now to the power of the State over *private* property, we shall see that all legitimate acts of power may be classified as follows:

First. The State may regulate the making of contracts between citizens in respect to property and prescribe generally as to their validity and effect, and may make such enactments as to the acquisition and disposition of property as the public welfare requires. Instances of this right are seen in the statute of frauds, statute of wills, recording acts, conveyancing acts, and the like.

Second. The State may deprive an individual of his property and vest it in another in order to compel the former to fulfill a moral or legal obligation which he owes the latter. Upon this right are founded the laws for the attachment and sale of property on civil process, the bastardy laws, laws making the support of wife and children compulsory, and so forth.<sup>5</sup>

<sup>5</sup> "Beside the right of the State to take private property for public use under the right of eminent domain, the right of taxation and the right to assess fines and for-

feitures for crimes, the State may also take the private property of one individual, and transfer it to another whenever in equity and good conscience the former has

Third. The State may deprive an individual of his property, as a punishment for the violation of law. All laws imposing fines and forfeitures are examples of this power.

Fourth. The State may regulate the use of property in such manner as the public health, safety, convenience and welfare may require. The establishment of fire limits and building regulations in cities, and the prohibiting of certain noxious trades and manufactures within certain localities, are familiar illustrations of this power. It is known as the Police Power, or the Right of Police Regulation.

Fifth. The State may exact of the individual a contribution of a portion of his property based upon some rule of apportionment, or the possession of some privilege or franchise, or the exercise of some trade or calling, in order to provide a fund for defraying the necessary expenses of the government. This is known as the Right of Taxation.

Sixth. The State may deprive a person of his property, or of some right or interest therein, for the purpose of appropriating the same, or making it subservient, to particular uses. Thus private property is taken and held by the State, or vested in public corporations, for the public use, as in the case of highways, canals, parks, public buildings and the like; or private corporations, or individuals, are authorized to institute proceedings for the purpose of compelling a transfer of property to themselves, to be devoted to some particular use, either of a public nature, such as railroads, turnpikes, etc., or of a private nature, such as private ways, mills and the like.

The acts which are described and included under this last division are universally spoken of as pertaining to the eminent domain. All other exercises of power over private

no right to withhold it from the latter, or to enable the State to fulfill some moral obligation resting upon such individual which he refuses to fulfill. Thus the State may take the private property of an individual to fulfill his contract, to pay his debts, or to

make compensation for injuries to person, reputation or property, which he has caused; or to support his wife or children when he refuses to do so." *Willetts v. Jeffries*, 5 Kan. 470, 475. (*Bastardy Case*.)

property and every species of right in, and control and regulation over, property of a public nature, may properly be referred, as we have shown, to some other of the sovereign powers of the State. Therefore eminent domain is properly limited in its application to the appropriation by a sovereign State of private property to particular uses, as the public welfare demands. This definition strips the term of all ambiguity and uncertainty, without robbing it of any significance or application which it properly embraces, or has acquired by common usage.

§ 3. *Nature of the power.*—There has existed, and still exists, among jurists a difference of opinion as to the nature of the power of eminent domain. Some maintain that it is a kind of reserved right, or supereminent estate or interest in all property, vested in the sovereign power. Thus the Supreme Court of Connecticut says: "The right to take private property for public use, or of eminent domain, is a reserved right attached to every man's land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised." And again: "The true theory and principle of the matter is, that the legislature resume dominion over the property, and, having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life, they revest it in other individuals or corporations, to be used by them, in such manner as to effect, directly or indirectly, or incidentally as the case may be, the public good intended."<sup>6</sup> This view is favored by the etymology of the name, and was doubtless the view entertained by those who brought the name into use. But the name is of comparatively recent origin,<sup>7</sup> and was applied to a power already existing and recognized, and we must look to the power, and not to the name, to determine its true significance. The implication

<sup>6</sup> Todd v. Austin, 34 Conn. 78; see also Harding v. Goodlett, 3 Yerg. (Tenn.) 41; Beekman v. Saratoga and Schenectady R. R. Co., 3 Paige, 45.

<sup>7</sup> The name appears to have been brought into use by Grotius and other continental writers in the early part of the seventeenth century.



which the name imports was perceived by writers contemporary with its introduction, who protested against the implication of its etymology, but accepted it as a convenient name for a power which was well defined.<sup>8</sup>

Whether the eminent domain is a reserved right or estate, is a theoretical question, as we have met with no decision which turns upon a distinction in that respect, but as wrong theories about the nature and foundation of a right or power may lead to incorrect and injurious practical results, it is a question which should not be passed by in a treatise on the subject.

We therefore offer some suggestions which seem to us decisive against the theory under consideration.

(1.) No State ever yet made any such reservation in the grant of property or in any way claimed or recognized such an estate.

(2.) A new sovereignty may arise, or an old sovereignty be extended, over territory which is already the subject of private ownership, and which, just before, was subject to the eminent domain of a sovereignty that has ceased to exist. But this territory is subject to the eminent domain of the sovereignty so created or extended, although it could not have reserved any right or estate therein.

(3.) Property that has been once resumed, or appropriated, may still be subject to the right under the same conditions as before,<sup>9</sup> which is hardly consistent with the

<sup>8</sup> Thus Puffendorf, writing in the seventeenth century, says: "The eminent domain (*dominium eminens*) is what some are afraid of, more upon account of the name than the thing. The sovereign power, say they, was erected for the common security, and that alone will give a Prince a sufficient right and title to make use of the goods and fortunes of his subjects whenever necessity requires; because he must be supposed to have a right to everything without which the

public good cannot be obtained. And the eminent domain is too arrogant and ambitious a word and which ill princes may sometimes abuse to the damage and ruin of their subjects. But, as it is trifling to dispute about words, so I think there can be no absurdity or danger in giving a particular name to a particular branch of the sovereign power as it exerts itself in a certain way upon certain things." Puff. b. 8, c. 5, §7, Eng. Translation 1703.

<sup>9</sup> Post, § 276.

theory that the State merely asserts its paramount title, and resumes possession and use of its own; for, having once asserted its title in that way, the power would be exhausted.

(4.) In the United States, each State government possesses the power of eminent domain over all the property in the State, as completely and effectually as though the Federal government did not exist, and the latter government is at the same time clothed with the same power over the same property for all the purposes for which it may appropriate property as completely and effectually as though the State governments did not exist. Here, then, according to the theory in question, must be two paramount titles and two reserved estates in the same property at the same time, which is absurd.

(5.) When a new State is admitted into the Union, formed wholly out of territory either belonging to the general government or held under it, the right of eminent domain immediately attaches to the new State, as to all the property within it, the same as though it had originally owned and granted the land, and although it could not have reserved the right and has not received the grant of it, or of any right or estate in the land, from the general government. It is difficult to understand how the State can have reserved a right in land which it never owned.

(6.) The doctrine of a reserved right or title will not apply at all to personal property, and yet there is no doubt that such property is subject to the right of eminent domain to the same extent and in the same manner as real property.<sup>10</sup>

(7.) Finally, if it is a reserved right, or paramount title or estate, in property, it is something which might be disposed of by grant. Any right which is capable of being reserved in land or property, and every species of estate or title therein, may be the subject of a grant or conveyance. But all the authorities agree that the power itself cannot be bargained away or extinguished.<sup>11</sup>

<sup>10</sup> Post, § 263; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 58.

<sup>11</sup> Puff. b. 8, c. 5, § 7; *New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co.*, 36 Conn.



We conclude, therefore, that eminent domain is not of the nature of any estate or interest in property, reserved or otherwise acquired, but simply a power to appropriate individual property as the public necessities require, and which pertains to sovereignty as a necessary, constant and inextinguishable attribute.<sup>12</sup>

196; *Sholl v. German Coal Co.*, 118 Ills. 427; *Tait's Executor v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. Rep. 297.

<sup>12</sup> "It is a necessary attribute of sovereignty in the State rather than any reserved right in the grant of property to the citizen." *Noll v. Dubuque, B. & M. R. R. Co.*, 32 Ia. 66; *Hartwell Matter*, 2 Nisi Prius Rep. (Mich.) 97; 2 *Redfield on R. R.*, p. 229. "But, practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because it is a portion of the national sovereignty which is inalienable by the government, or whether the right is created by the public necessity, which at the time calls for its exercise,—its existence in every State is indispensable and incontestible." *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. Law (N. C.) 451. "Whether this principle be denominated the right of transcendental propriety, or of eminent domain, or as is more properly by Grotius, the force of supereminent dominion, it means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. This

principle or right does not rest, as supposed by some, upon the notion that the State had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession of it, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign, it is held subject to a tacit agreement or implied reservation that it may be resumed, and all individual rights to it extinguished by a rightful exertion of sovereign power. Such a doctrine is bringing the principles of the social system back to the slavish theory of Hobbes, which however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly granted by it to individuals, it is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments. Besides, it will not apply at all to personal property, which in many cases is entirely the creation of its individual owners; and yet the principle of appropriating private property to public use, is full as extensive in regard to personal as to real property." *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9, 57.

§ 4. **Eminent domain distinguished from taxation.**—Besides the power of eminent domain, the State is clothed, by virtue of its sovereignty, with other powers over private property, with which it is closely allied and sometimes confounded. These are the power of taxation and the power of police regulation. A tax is a contribution exacted by the government from all the individuals of the State, or from those of a particular class or locality, for the purpose of defraying the public expenses.<sup>13</sup> The contribution may be of money or of property.<sup>14</sup> But when property is exacted instead of money, it is not because the State needs the particular property, but because that form of exaction, owing to the scarcity of money, will be more promptly and certainly complied with. Taxation is also based upon some rule of apportionment, as when made upon

"The exercise of the right of eminent domain by a sovereign cannot be the creation of grant or compact. It inheres in the existence of an independent government, and comes into being eo instanti with its establishment, and continues as long as the government endures. The United States did not derive the right to exercise in Louisiana from France, or in Florida from Spain, or in California from Mexico, or in Alaska from Russia; the right was coeval with its proprietorship as sovereign." *United States v. Cooper*, 9 Mackey, D. C. 104, 117. See also *Scholl v. German Coal Co.*, 118 Ills. 427; *Matter of Firman Street*, 17 Wend. 649, 659; *Heyward v. Mayor etc. of New York*, 7 N. Y. 314; *White v. Nashville etc. R. R. Co.*, 7 Helsk. 518; *Roanoke City v. Berkowitz*, 80 Va. 616; *Baltimore & Ohio R. R. Co. v. Pittsburg etc. R. R. Co.*, 17 W. Va. 812, 841; *Steele v. County*

*Comrs.*, 83 Ala. 304; *Moran v. Ross*, 79 Cal. 159; 21 Pac. Rep. 547; *People v. B. & O. R. R. Co.*, 117 N. Y. 150, 22 N. E. Rep. 1026; *Winona & St. P. R. R. Co. v. City of Watertown*, 4 S. D. 323, 56 N. W. Rep. 1077; *Jones v. Walker*, 2 Paine C. C. 688; *Cherokee Nation v. So. Kans. R. R. Co.*, 33 Fed. Rep. 900; *Kansas City v. Marsh Oil Co.*, 140 Mo. 453, 464; *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205; *People v. Adirondack R. R. Co.*, 160 N. Y. 225, 237.

<sup>13</sup> "Taxes are defined as being the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all public needs." *Cooley on Taxation*, p. 1. See also *Burroughs on Taxation*, chap. I.; *Hilliard, id.*, Introduction.

<sup>14</sup> See *Dowell's Hist. Taxation in England*.



persons according to number, or upon property according to value or quantity or benefits. In all these respects a tax differs from an exercise of the power of eminent domain. "Taxation exacts money, or services, from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual and without reference to the amount, or value exacted from any other individual, or class of individuals."<sup>15</sup>

§ 5. Distinguished from special assessments or betterments. —There is a peculiar species of taxation, known as special assessments or betterments, which is often confounded with the power of eminent domain. The system prevails in all the States, of assessing a part, or the whole, of the cost of local improvements upon the property specially benefited. These local improvements are usually made to accommodate a particular locality, generally at the instance of property owners in that locality, who urge the improvement for the express purpose of enhancing the value of their property. It seems but just that those whose

<sup>15</sup> *People v. Mayor etc. of Brooklyn*, 4 N. Y. 419, 1851. Approved in *Hummett v. Philadelphia*, 65 Pa. St. 146, 1870; see also *C. W. etc. R. R. Co. v. Coms. of Clinton County*, 1 Ohio St. 77, 101, 102; *Washington Ave.*, 69 Pa. St. 352; *Gibson v. Mason*, 5 Nev. 283, 303; *Griffin v. Dogan*, 48 Miss. 11; *Turner v. Althaus*, 6

Neb. 54; *City of Aurora v. West*, 9 Ind. 74; *Gibbons v. Mobile etc. R. R. Co.*, 36 Ala. 410; *Stein v. Mayor etc. of Mobile*, 24 Ala. 591; *Harward v. St. Clair etc. Drainage Co.*, 51 Ill. 130; *Richman v. Board of Supervisors*, 77 Ia. 513; 42 N. W. Rep., 422; *Alfalfa Irrigation Dist. v. Collins*, 46 Neb. 411; 64 N. W. Rep. 1086;



property is thus enhanced, and who thus receive peculiar benefits from the improvement, should contribute specially to defray its cost.<sup>16</sup> Special benefits being thus the foundation, or principle, upon which the special contribution is based, it should not exceed the benefits conferred.<sup>17</sup> A special assessment is thus seen to be a contribution levied upon a particular class of individuals, and apportioned among them according to the quantity or value of property possessed by each in the locality of the improvement, and in the ratio of benefits conferred. Here is every element of a tax and not one element of the exercise of eminent domain. Under the latter power it is always sought to appropriate specific property, without regard to any ratio or apportionment. A special assessment is a contribution of money the same as a general tax. The compensation received in benefits does not differ in principle from the compensation received, or supposed to be received, for general taxes, and is often a myth in fact in the one case as in the other. All this seems so evident that the wonder is that any court should have come to a contrary conclusion. The only State in which the doctrine has been unequivocally announced that special assessments fall under the power of eminent domain, is Illinois, and in that State the courts seem to have been driven to that conclusion in order to sustain such assessments at all, owing to the peculiar provisions as to taxation in the constitution of that State then in force.<sup>18</sup>

*County of Mobile v. Kimball*, 102 U. S. 691, 703; *Board of Commissioners v. Reeves*, 148 Ind. 467; and see post §§ 5 and 155.

<sup>16</sup> *Lockwood v. St. Louis*, 24 Mo. 20, 22.

<sup>17</sup> *Norwood v. Baker*, 172 U. S. 269; *Hutchinson v. Storrie*, 92 Tex. 685; 51 S. W. Rep. 848.

<sup>18</sup> The provision requiring uniformity. *Chicago v. Larned*, 34 Ills. 203; *Canal Trustees v. Chicago*, 12 Ills. 406; *Chicago v. Colby*, 20 Ills. 614; *McBride v. Chicago*, 22 Ills. 576; *Peoria v.*

*Kidder*, 26 Ills. 351; *Town of Pleasant v. Kost*, 29 Ills. 490; *Howard v. St. Clair Drain Co.*, 51 Ills. 130; *Hessler v. Drainage Coms.*, 53 Ills., 105; *Wright v. Chicago*, 46 Ills. 44. The Supreme Court of Michigan encountered the same obstacle in the constitution of that State, but overcame it by holding that the constitutional provisions applied only to taxes of the ordinary kind for State, county and municipal expenses, and that therefore the legislature had plenary

Since this difficulty was removed by the adoption of the present constitution, the Supreme Court of that State has concluded that a special assessment is a tax and not an exercise of the power of eminent domain.<sup>19</sup> Other courts have exhibited some vacillation on this subject,<sup>20</sup> but we

power over this other kind of taxation, and so sustained special assessments as a tax. *Woodbridge v. Detroit*, 8 Mich. 274. In *City of Raleigh v. Peace*, 110 N. C. 32, 14 S. E. Rep. 521, a special assessment was sustained as an exercise of the taxing power, notwithstanding a similar provision in the constitution of that State. And see *Munson v. Board of Commissioners*, 43 La. An. 15, 8 So. Rep. 906.

<sup>19</sup> *White v. People*, 94 Ills. 604, 1880; *Chicago etc. R. R. Co. v. Elmhurst*, 165 Ills. 148; 46 N. E. Rep. 43.

<sup>20</sup> In Louisiana the court first held special assessments to be an exercise of the taxing power in *Municipality No. 2 v. White*, 9 La. An. 446, 1854, and afterwards in *The New Orleans Drainage Co. etc.*, 11 La. An. 338, 1856, and *Surgi v. Snetchman*, 11 id. 387, 1856, held them to be an exercise of the power of eminent domain, but finally leave the question in uncertainty in *Wallace v. Shelton*, 14 id. 503, 1859, and *City of New Orleans etc.* 20 id. 407, 1868; and see further *New Orleans v. Elliott*, 10 La. An. 59, 1855; *Yeatman v. Crandall*, 11 id. 220, 1856. Recent cases have settled that a special assessment is a tax in its essential nature, though not a tax within the meaning of the constitutional provisions on the

subject of taxation. *Munson v. Board of Comrs.*, 43 La. An. 15, 8 So. Rep. 906; *Charnock v. Levee Co.*, 38 La. An. 323; *Manufacturing Co. v. Green*, 39 La. An. 455, 1 So. Rep. 873. In the first of these cases it is said: "The levy of a local assessment is an exercise of the taxing power in its broadest and most comprehensive sense; yet it is not a tax, eo nomine, and is not governed by the provisions of the constitution on the general subject of taxation; but it is exerted entirely independently of all its provisions on the subject of taxation." In New York the Court of Errors in 1844-5 held assessments to be an exercise of the taxing power. *Striker v. Kelley*, 7 Hill 9, 1844; *S. C. 2 Denio*, 323, 1845. Afterwards there were three decisions to the contrary in the Supreme Court. *Jordan v. Hyatt*, 3 Barb. 275, 1848; *People ex rel. etc. v. Mayor etc. of Brooklyn*, 6 id. 209, 1849; *People ex rel. etc. v. Mayor etc. of Brooklyn*, 9 id. 535, 1850. But the doctrine was finally settled in favor of the text in the case of *People ex rel. etc. v. Mayor etc. of Brooklyn*, 4 N. Y. 419, 1851, where the court discuss at length the distinguishing characteristics of a tax and of an exercise of the eminent domain power. To same effect, *Astor v. Mayor etc. of New York*, 5

believe that the doctrine is now universal to the effect that special assessments are to be referred to the power of taxation.<sup>21</sup>

§ 6. **Distinguished from the police power.**—Every one is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property

Jones & S. 539; Moran v. City of Troy, 9 Hun, 540. Other cases holding or intimating that special assessments fall under the power of eminent domain are the following: Extension of Hancock Street, 18 Pa. St. 26; Zoeller v. Kellogg, 4 Mo. Ap. 163; State v. City Council, 12 Rich. S. C. 702; Sutton's Heirs v. City of Louisville, 5 Dana 28. See Cribbs v. Benedict, 64 Ark. 555. In Philadelphia v. Penn Hospital, 143 Pa. St. 367, 22 Atl. Rep. 744, an ordinance that the footways of all streets and highways should be graded, curbed, paved and kept in repair at the expense of the abutting owner, was held to be an exercise of the police power and not of the power of taxation.

<sup>21</sup> "The form and manner, spirit and bearing of an act of State, decide whether it be an exercise of the right of eminent domain, or the right of taxation, and not the mere physical nature of the thing ultimately obtained by it for the public use." In the Matter of Dorrence Street, 4 R. I. 230, 246. In support of the text, see: Burnett v. Mayor etc. of Sacramento, 12 Cal. 76; Creighton v. Manson, 27 Cal. 613; Emery v. San Francisco Gas Co.,

28 Cal. 345, 350; Chambers v. Saterlee, 40 Cal. 497; Hagar v. Board of Supervisors of Yolo Co., 47 Cal. 222; Nichols v. City of Bridgeport, 23 Conn. 189; Alexander v. Mayor etc. of Baltimore, 5 G. & J. (Md.) 383; Mayor, etc. of Baltimore v. Greenmount Cemetery, 7 Md. 517; Williams v. Mayor etc. of Detroit, 2 Mich. 561; Woodbridge v. Detroit, 8 Mich. 274; McComb v. Bell, 2 Minn. 295; Garrett v. St. Louis, 25 Mo. 505; Newby v. Platt Co., 25 Mo. 258; Palmyra v. Morton, 25 Mo. 593; People ex rel. etc. v. Mayor etc. of Brooklyn, 4 N. Y. 419; State v. Mayor etc. of Newark, 35 N. J. L. 168; State v. Blake, 36 N. J. L. 442; S. C. 35 N. J. L. 208; Coster v. Tide Water Co., 18 N. J. Eq. 54; S. C. on appeal, 18 N. J. Eq. 518; Scoville v. City of Cleveland, 1 Ohio St. 126; Hill v. Higdon, 5 Ohio St. 243; Ridenour v. Saffin, 1 Handy, 464; Allen v. Drew, 44 Vt. 174; Woodhouse v. Burlington, 47 Vt. 300; Edgerton v. Green Cove Springs, 19 Fla. 140; Speer v. Athens, 85 Ga. 49; 11 S. E. Rep. 802; Briggs v. Union Drainage Dist., 140 Ill. 53, 29 N. E. Rep. 721; Yeomans v. Riddle, 84 Ia. 147, 50 N. W. Rep. 886; Bradley v. McAtee, 7 Bush, 667;



owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives.<sup>22</sup> It is the enforcement of this last duty which pertains to the police power of the State so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking, an exercise of police power, and not of eminent domain.<sup>23</sup> But the moment the legislature passes

*City of Covington v. Worthington*, 88 Ky. 206; 10 S. W. Rep. 790, 11 S. W. Rep. 1038; *Williams v. Cammack*, 27 Miss. 209; *St. Louis v. Speck*, 67 Mo. 403; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. Rep. 683; *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. Rep. 368; *Litchfield v. Vernon*, 41 N. Y. 123; *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. Rep. 730; *Walston v. Nevlin*, 128 U. S. 578, 9 S. C. Rep. 192; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. Rep. 1091; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. Rep. 629; *Norword v. Baker*, 172 U. S. 269. The nature of special assessments will be found to be exhaustively discussed and the authorities reviewed in *Town of Macon v. Patty*, 57 Miss. 378; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Hancock Street*, 18 Pa. St. 26; *Davidson v. New Orleans*, 96 U. S. 97. Where a city assessed land for repairing and curbing a street which had just been paved and curbed by the city and was in good condition, the object being to make the street conform to a new and different plan, it

was held that the assessment would be in derogation of the rights of private property. *Wistar v. Philadelphia*, 8 Pa. St. 505.

<sup>22</sup> "Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others." *Coates v. Mayor etc. of New York*, 7 Cow. 585, 605. See also *Commonwealth v. Alger*, 7 Cush. 84; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Jamieson v. Indiana Natural Gas & O. Co.*, 128 Ind. 555, 28 N. E. Rep. 76; *Lawton v. Steele*, 152 U. S. 133.

<sup>23</sup> *King v. Davenport*, 98 Ills. 305; *Munn v. People*, 69 Ills. 80; S. C. affirmed, 94 U. S. 113; *N. W. Fertilizing Co. v. Hyde Park*, 70 Ills. 634; S. C. affirmed, 97 U. S. 659; *Hine v. New Haven*, 40 Conn. 478; *People v. Hawley*, 3 Mich. 330; *Baker v. Boston*, 12 Pick. 184; *Commonwealth v. Tewksbury*, 11 Met. 55; *Watertown v. Mayo*, 109 Mass. 315; *St. Louis v. Stern*, 3 Mo. Ap. 48; *Vanderbilt v. Adams*, 7 Cow. 349; *Roosevelt v. Godard*, 52 Barb.

beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.<sup>21</sup> We shall defer until a subsequent chapter a discussion of the limits of the police regulation of private property and of the acts which, though under the guise of police regulation, amount to a taking of property for public use, and which, therefore, can only be accomplished under the power of

533; *Beer Co. v. Massachusetts*, 97 U. S. 25; *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. C. & N. W. R. R. Co.*, 94 U. S. 164; *Jamieson v. Indiana Nat. Gas & O. Co.*, 128 Ind. 555, 28 N. E. Rep. 76; *Am. Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. Rep. 919, 4 Am. R. R. & Corp. Rep. 199; *McCandless v. Richmond & D. R. Co.*, 38 S. C. 103, 16 S. E. Rep. 429, 7 Am. R. R. & Corp. Rep. 366; *City of Charleston v. Werner*, 38 S. C. 488, 17 S. E. Rep. 33, 8 Am. R. R. & Corp. Rep. 73; *Town of Summerville v. Presby*, 33 S. C. 56, 11 S. E. Rep. 545, 3 Am. R. R. & Corp. Rep. 101; *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. C. Rep. 992, 1257; *Lawton v. Steele*, 152 U. S. 133; *S. C. 119 N. Y. 326*, 23 N. E. Rep. 878. In *Philadelphia v. Scott*, 81 Pa. St. 80, the court, speaking of the powers of eminent domain and police, say: "In their leading features, these powers are plainly different, the latter reaching even to destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in case of a nuisance tending to

breed disease. In the first instance, the community proceeds on the ground of overwhelming calamity; and in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based upon disaster, fault, or inevitable necessity. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, but in public utility. These distinctions clearly mark the cases distant from the border line between the two powers, but in or near to it they begin to fade into each other, and it is difficult to say when compensation becomes a duty and when not."

<sup>21</sup> *Lake View v. Rose Hill Cemetery Co.*, 70 Ills. 192; *Chicago v. Laffin*, 49 Ills. 172; *Commonwealth v. Bacon*, 13 Bush. 210; *Matter of Petition of Cheesbrough*, 78 N. Y. 232; *Commonwealth v. Penn. Canal Co.*, 68 Pa. St. 41; *State v. Glenn*, 7 Jones L.



eminent domain.<sup>25</sup> It is sufficient for the present purpose to point out the distinction between the two powers. Under the one, the public welfare is prompted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and appropriating it to some particular use.

§ 7. Distinguished from the damaging or destruction of property in cases of necessity.—At common law the right exists in individuals, in cases of emergency where the danger is imminent and admits of no delay, to control and destroy property in order to avert a public calamity.<sup>26</sup> The most common example of the exercise of this right, is the demolition of buildings to prevent the spreading of a conflagration.<sup>27</sup> In all such cases, if the judgment of the individual was a reasonable one under the circumstances in which he was placed, he is not liable, even though it should finally turn out that the destruction was, in fact, unneces-

321; *Cornelius v. Glenn*, 7 Jones L. 512; *Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 396; *New Orleans Water Works Co. v. St. Tammany Water Works Co.*, 4 Wood C. C. 134; *Crescent City etc. Co. v. Butchers' Union etc. Co.*, 4 Wood C. C. 96.

<sup>25</sup> Post, § 156.

<sup>26</sup> 2 Kent's Com. 338; *Dillon Munic. Corp.* § 955 (756); *Mouser's Case*, 12 Coke, 62; *King's Prerogative in Saltpeter*, 12 Coke, 12; *Bowditch v. Boston*, 101 U. S. 16; and cases cited in subsequent notes to this section. "The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any

other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained." Senator Sherman in *Russell v. Mayor etc. of New York*, 2 Denio 461, 474.

<sup>27</sup> The right of a traveler to go upon adjacent property when a highway is impassable is referred to the same law of necessity. *Irwin v. Yeager*, 74 Ia. 174, 37 N. W. Rep. 136. This was trespass for such a use of private property when the highway was blocked by snow. The court says:

"This right is based on the ground of inevitable necessity; and also when the public convenience and necessity come in

sary.<sup>28</sup> Though the right is regulated by statute and officers designated to determine upon the necessity and order the destruction, the nature of the act remains unchanged. In such cases no remedy exists except such as was previously given by the common law, or is conferred by the statute.<sup>29</sup> The regulation of the right by statute does not bring its exercise under the power of eminent domain.<sup>30</sup> This right is plainly distinguishable from the right of eminent domain. It is a right which exists in the individual, and not in the

conflict with private right, the latter must yield to the former. Such fact, therefore, may be pleaded and shown as an excuse for the alleged trespass. Such temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject." p. 177.

<sup>28</sup> *Conwell v. Emrie*, 2 Ind. 35; *Surocco v. Geary*, 3 Cal. 69; *Dunbar v. The Alcalde etc. of San Francisco*, 1 Cal. 355; *McDonald v. City of Red Wing*, 13 Minn. 38; *Field v. Des Moines*, 39 Ia. 575; *Hale v. Lawrence*, 21 N. J. L. 714; *Bowditch v. Boston*, 101 U. S. 16; *Mouse's Case*, 12 Coke, 62. In *Bishop v. Macon*, 7 Ga. 200, a contrary doctrine appears to be held.

<sup>29</sup> *People ex rel. v. Common Council of Buffalo*, 76 N. Y. 558; *Bowditch v. City of Boston*, 4 Clifford, 323; *Keller v. Corpus Christi*, 50 Tex. 614; *Mayor etc. of New York v. Lord*, 17 Wend. 285; S. C. 18 Wend. 126; *Mayor etc. of New York v. Pentz*, 24 Wend. 668; *Russell v. Mayor etc. of New York*, 2 Denio 461; *American Print Works v. Lawrence*, 21 N. J. L. 248; S. C. 21 N. J. L.

714; 23 N. J. L. 590; *Parsons v. Pettingill*, 11 Allen 507; *Taylor v. Plymouth*, 8 Met. 462; *White v. City Council of Charleston*, 2 Hill S. C. 571; *Field v. Des Moines*, 39 Ia. 575; *Bowditch v. Boston*, 101 U. S. 16; *Town of Dawson v. Katter*, 48 Ga. 133. For a construction of the New York statute as to goods in buildings destroyed, see *Mayor etc. of New York v. Stone*, 20 Wend. 139.

<sup>30</sup> In *American Print Works v. Lawrence*, 21 N. J. L. 248, 258, *Green, C. J.*, says: "I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the constitution. Nor is the principle altered by the fact that the destruction in the present instance was committed under legislative sanction. The right of destruction existed prior to the enactment. The statute created no new power. It conferred no new right. It merely converted a right of necessity into a legal right. It regulated the mode in which a previously existing power should be exercised." See also S. C. 23 N. J. L. 590; *Russell v.*

State; by nature, and not as the result of political organization.<sup>31</sup>

§ 8. **Distinguished from the war power.**—The taking, injuring and destruction of property in time of war, is clearly allied to the injury and destruction of property referred to in the last section. The war power is founded on necessity. It is exercised by the State and its authorized agents, not by individuals acting independently and upon their own authority.<sup>32</sup> According to the laws of war, private property in the enemy's country, whether belonging to friend or foe, useful to the enemy for attack, or defense, or subsistence, may be rightfully taken or destroyed.<sup>33</sup> The owners of property injured, or destroyed, in the actual operations of war, in battle, in the movement of troops, in the construction of works of attack or defense, are without remedy.<sup>34</sup> So of property wantonly destroyed by troops. The destruction of property to prevent its falling into the hands of the enemy falls under the same power.<sup>35</sup> In such cases the officer acts at his peril and upon his own responsibility. If his judg-

Mayor etc. of New York, 2 Denio, 461; *Field v. Des Moines*, 39 Ia. 575; *Keller v. Corpus Christi*, 50 Tex. 614; *Bowditch v. City of Boston*, 4 Clifford, 323. Compare *Hale v. Lawrence*, 21 N. J. L. 714.

<sup>31</sup> "The right of eminent domain is a public right; it arises from the laws of society, and is vested in the State or its grantee, acting under the right and power of the State, and is the right to take or destroy private property for the use or benefit of the State, or of those acting under and for it. The right of necessity arises under the law of nature; it is older than the laws of society or society itself. It is the right of self-defense, of self-preservation, whether applied to persons or to property. It is a private right vested in every in-

dividual, and with which the rights of the State or State necessity has nothing to do." Per Randolph, J., in *American Print Works v. Lawrence*, 23 N. J. L. at 615; S. C. 21 N. J. L. at p. 257.

<sup>32</sup> See *Beck v. Ingram*, 1 Bush (Ky.) 355.

<sup>33</sup> *Bell v. Louisville & Nashville R. R. Co.*, 1 Bush (Ky.) 404; see 13 Am. Law Reg. N. S. 275. "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." *Lamar v. Browne*, 92 U. S. 187, 194.

<sup>34</sup> *Bell v. Louisville & Nashville R. R. Co.*, 1 Bush (Ky.) 404; see article in 13 Am. Law Reg. N. S. 337.

<sup>35</sup> *Respublica v. Sparhawk*, 1



ment was a reasonable one, in view of the circumstances as they appeared to him at the time, and the information he had a right to rely upon, the act is justifiable, and the loss is the owner's misfortune. If the officer's action was not justified as above explained, he is personally responsible.<sup>36</sup> It is in no event an exercise of the power of eminent domain. There is not wanting, however, some authority for a contrary view.<sup>37</sup> Where the property of a citizen is impressed into the service of the State in time of war, which would ordinarily be procured by contract, except for the emergency, there is a taking within the meaning of the constitution, and the owner is entitled to compensation.<sup>38</sup> But if there is a lack of good faith, or of a sufficient emergency, or of proper authority, the person taking the property will be liable.<sup>39</sup> In case of such impressment of property, the compensation must be fixed by an impartial tribunal, and not arbitrarily by the government.<sup>40</sup> Personal property once rightly impressed vests absolutely in the government, and

Dall. 357; *Ford v. Surget*, 46 Miss. 130; Article 13 Am. Law Reg. N. S. 401.

<sup>36</sup> *Mitchell v. Harmony*, 13 How. 115; *Farmer v. Lewis*, 1 Bush (Ky.) 66; *Dills v. Hatcher*, 6 Bush (Ky.) 606; *Christian County Court v. Rankin*, 2 Duv. Ky. 502. And see *Clark v. Mitchell*, 64 Mo. 564; S. C. 69 Mo. 627.

<sup>37</sup> *Grant v. United States*, 1 Ct. of Cl. 41; *Mitchell v. Harmony*, 13 How. 115. But see comments on these cases in 13 Am. Law Reg. 415, note. In *Corbin v. Marsh*, 2 Duv. Ky. 463, and *Hughes v. Todd*, 2 Duv. Ky. 188 the act of Congress providing for the enlistment or drafting of colored persons or slaves, authorizing a compensation of not exceeding \$300 to the loyal owner of any such slave and that

such slave should be free, and also providing that the mother, wife and children of the soldier should be free, was held to be unconstitutional, as in violation of the eminent domain clause of the Constitution.

<sup>38</sup> *Drehman v. Stifel*, 41 Mo. 184; *Wallace v. Alvord*, 39 Ga. 609; *Price v. Poynton*, 1 Bush (Ky.) 387.

<sup>39</sup> *Barrow v. Page*, 5 Haywood (Tenn.) 97; *Tyson v. Rogers*, 33 Ga. 473; *Jones v. Commonwealth*, 1 Bush (Ky.) 34; *Sellards v. Zomes*, 5 Bush (Ky.) 90; *Brakebill v. Leonard*, 40 Ga. 60; *Lewis v. McGuire*, 3 Bush (Ky.) 202; *Hogue v. Penn*, 3 Bush (Ky.) 663; *Ferguson v. Loar*, 5 Bush (Ky.) 689.

<sup>40</sup> *Cox v. Cummings*, 33 Ga. 549; *Cunningham v. Campbell*, 33 Ga. 625.

does not revert when the emergency ceases.<sup>41</sup> It has been held that money and real estate cannot be lawfully impressed.<sup>42</sup>

<sup>41</sup> Taylor v. Nashville & Chattanooga R. R. Co., 6 Cold. 646; contra, Fryer v. McRae, 8 Porter (Ala.) 187. And see Hawkins v. Nelson, 40 Ala. 553.

<sup>42</sup> White v. Ivey, 34 Ga. 186; Terrill v. Rankin, 2 Bush 453. On the general subject of the section the following cases, arising under the federal captured and abandoned property act, will be found of interest. Harrison v.

Myer, 92 U. S. 111; Whitefield v. United States, 92 U. S. 165; Lamar v. Brown, 92 U. S. 187; United States v. Ross, 92 U. S. 281; United States v. Diekelman, 92 U. S. 520; Conrad v. Waples, 96 U. S. 279; Burbank v. Conrad, 96 U. S. 291; Branch v. United States, 100 U. S. 673; Walker v. United States, 106 U. S. 413; Kirk v. Lynd, 106 U. S. 315.

## CHAPTER II.

### CONSTITUTIONAL PROVISIONS.

§ 9. **In general.**—The eminent domain, as we have already seen, is a sovereign power and devolves upon those persons in a State who are clothed with the supreme authority. In the States of the American Union these persons are the people, or, more strictly, that portion of the people invested with the elective franchise. The power of eminent domain has been delegated by the people to the legislative department of the government in the general grant of legislative power.<sup>1</sup> In nearly all the States this grant has been accompanied by an express limitation upon the legislature in the exercise of the power. The ordinary and typical form of this limitation is, that private property shall not be taken for public use without just compensation. The later constitutions, however, display a tendency to amplify and complicate this simple prohibition with special reference to the taking of property by municipal and private corporations, and also with reference to the time and manner of compensation. As these constitutional provisions form the basis of a great multitude of decisions, they have, for convenience of reference and the better understanding of the decided cases, been collated at the end of this chapter. It will be observed that but one State, North Carolina, now remains without a provision on this subject in its organic law.<sup>2</sup> Other States have been without such a provision, as follows: New York, until 1822; New Jersey, until 1844;

<sup>1</sup> "The power itself is an inseparable incident of sovereignty, and its exercise was delegated by the sovereign power to the general assembly, in the general grant of legislative authority." *Geizey v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308, 323; also *Todd v. Austin*, 34 Conn. 78.

<sup>2</sup> The Constitution of New Hampshire does not expressly require compensation to be made and is virtually without any provision on the subject. See post § 38 and *Opinion of the Justices*, 66 N. H. 629, 33 Atl. Rep. 1076. So also the Constitution of Virginia, post, § 50.



Louisiana, until 1845; Maryland, until 1851, and Arkansas, Georgia and South Carolina, until 1868. The provision first appears in the constitution of Vermont, adopted in 1777. Massachusetts and Pennsylvania follow in 1780 and 1790 respectively. The principal questions which have arisen in construing these constitutional provisions are, first, what constitutes a taking; second, what is a public use, and, third, what is just compensation; and these questions are discussed in the succeeding chapters.

§ 10. The constitutional provision a limitation: States which have none.—It is a very interesting question, whether, in those States whose constitutions contain no provision in regard to taking private property for public use, the legislature is under any restraint whatever in the exercise of the power. But this question has lost most of its practical interest, from the fact that all States except one<sup>3</sup> now have an express limitation in their organic law touching the exercise of this power. The courts of nearly all the States which are, or have been, without such a limitation, have held that the limitation itself was simply declaratory of certain great and fundamental principles of natural justice and equity which were as binding and obligatory upon the legislature as though expressly incorporated into the written constitution.<sup>4</sup> The idea, however,

<sup>3</sup> North Carolina.

<sup>4</sup> Spencer, J., in *Bradshaw v. Rodgers*, 20 Johns. 103, 1822, speaking of these constitutional provisions, says: "They are declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice." S. C. 20 Johns. 735, 1823. In *Harness v. The Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248, 1848, it was said that, independent of constitutions, "there was a principle of right and justice inherent in the na-

ture and spirit of the social compact, which restrained and set bounds to the authority of the legislature, and beyond which it could not be allowed to pass—that principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power." And see *Martin et al. ex parte*, 13 Ark. 198; *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494; *Doe v. Georgia R. R. & B. Co.*, 1 Ga. 524; *Young v. McKenzie*, 3 Ga. 31; *Parham v. Justices etc. of Decatur County*, 9 Ga. 341; *Loughbridge v. Harris*, 42

that the legislature of a State is restrained by limitations which are not to be found in the written constitution, is not founded upon any sound legal or philosophical principles. The later authorities and the better reasoning are against such a view. The subject has been fully treated by Mr. Sedgwick and Mr. Cooley in their admirable treatises on constitutional law.<sup>5</sup>

The true theory is that these constitutional provisions are limitations upon the power of eminent domain as vested in the legislative department of the State. They are neither to be regarded as declaratory of what the law would be without them, nor as grants of the power in question to the legislature.<sup>6</sup> In some of the States, which have, or have

Ga. 501; Matter of Highway, 22 N. J. L. 293; Johnston v. Rankin, 70 N. C. 550; State v. Lyle, 100 N. C. 497, 6 S. E. Rep. 379; Petition of Mt. Washington Road Co., 35 N. H. 134, 141, 142; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 160; State v. Franklin Falls Co., 49 N. H. 240, 251; Piscataqua Bridge Co. v. N. H. Bridge Co., 7 N. H. 35, 66, 70; Opinion of the Justices, 66 N. H. 629, 33 Atl. Rep. 1076; Polly v. Saratoga etc. R. R. Co., 9 Barb. 449. Contra, Lindsay v. Commissioners, etc., 2 Bay (S. C.) 38, 1796; Stark v. McGown, 1 Nott & McCord (S. C.) 387, 1818; Patrick v. Commissioners, etc., 4 McCord (S. C.) 541, 1828; Maniquet v. Commissioners of Roads, 4 McCord (S. C.) 541, 1828; State v. Dawson, 3 Hill (S. C.) 101, 1836; ex parte Withers, 3 Brevard (S. C.) 83; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. L. (N. C.) 451, 1837; The Central R. R. Co. v. Hetfield, 29 N. J. L. 206, 1861; Den. v. Morris Canal Co., 24 N. J. L. 587, 1854.

<sup>5</sup> Sedgwick on Const. & Stat. Law, pp. 123-132, 150-159; Cooley, Const. Lim. pp. 85, 86, 172, 173; see also Slack v. Maysville & Lexington R. R. Co., 13 B. Mon. 1, 22; see also City of Logansport v. Seybold, 59 Ind. 225; Churchman v. Martin, 54 Ind. 380; Quick v. White Water Township, 7 Ind. 570; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. Rep. 1062; Philadelphia v. Field, 58 Pa. St. 320; People v. Toynbee, 2 Parker (N. Y.) 490; People v. Gallagher, 4 Mich. 244; People v. Marshall, 6 Ills. 672; Forsythe v. City of Hammond, 68 Fed. Rep. 774.

<sup>6</sup> United States v. Jones, 109 U. S. 513, 518; B. & O. R. R. Co. v. P. W. & Ky. R. R. Co., 17 W. Va. 312, 341; Challiss v. A. T. & S. F. R. R. Co., 16 Kan. 117; District of City of Pittsburg, 2 W. & S. 320; Steele v. County Comrs., 83 Ala. 304; People v. Adirondack R. R. Co., 160 N. Y. 225, 237; The Water Works Co. of Indianapolis v. Burkhart, 41 Ind. 364; Winona & St. Peter R. R. Co.



had, no provision on the subject, the right to compensation has been worked out through other provisions of the constitution, such as the one that no person shall be deprived of life, liberty or property without due process of law.<sup>7</sup>

§ 11. The provision in the federal constitution.—The provision in the Constitution of the United States, that private property shall not be taken for public use without just compensation, applies only to the operations of the federal government and is not a limitation upon the power of the States.<sup>8</sup> The only dissent from this proposition is found in an early case in Georgia;<sup>9</sup> but the Supreme Court of that State afterwards modified their views and held in accordance with the text.<sup>10</sup> The provision applies to the territories.<sup>11</sup>

§ 12. Effect of a change in the constitution.—A constitu-

v. Waldron, 11 Minn. 515, 539. In the latter case the court says: "The right of eminent domain is not conferred by the constitution; but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress." Again, in Harvey v. Thomas, 10 Watts 63, "The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representatives and without just compensation is a disabling, not an enabling, one, and the right would have existed in full force without it."

<sup>7</sup> Martin ex parte, 13 Ark. 198; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; Parham v. Justices etc. of Decatur County, 9 Ga. 341; Norwood v. Baker, 172 U. S. 269. See especially Station v. Norfolk, R. R. Co., 111 N. C. 278, 16 S. E. Rep. 181. But a different conclusion is reached in

the South Carolina cases cited ante, n 4.

<sup>8</sup> Barron v. Mayor etc. of Baltimore, 7 Peters, 243; Withers v. Buckley, 20 How. 84; Pumpelly v. Green Bay Co., 13 Wall. 166, 176; Thorington v. Montgomery, 147 U. S. 490; 13 S. C. Rep. 394; Livingston v. Mayor etc. of New York, 8 Wend. 85; Cairo and Fulton R. R. Co. v. Turner, 31 Ark. 494; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law (N. C.) 451; Johnston v. Rankin, 70 N. C. 550; Concord R. R. Co. v. Greeley, 17 N. H. 47; Martin v. Dix, 52 Miss. 53; Renthorp v. Bourg, 4 Martin, O. S. (La.) 97; Wilson v. Baltimore & P. R. R. Co., 5 Del. Ch. 524.

<sup>9</sup> Doe v. Georgia R. R. & B. Co., 1 Ga. 524.

<sup>10</sup> Young v. McKenzie, 3 Ga. 31; Parham v. Justices of Decatur County, 9 Ga. 341.

<sup>11</sup> Territory of Utah v. Daniels, 6 Utah, 288, 22 Pac. Rep. 159.

tion may be revised or amended so as to introduce important changes regarding the power of eminent domain. The question may arise as to the effect of such changes upon existing laws, pending proceedings or works in progress. The solution of such questions pertains more properly to works on constitutional law;<sup>12</sup> but a brief discussion of them will not be out of place in this connection. Much must depend upon the facts of each case, but in general it may be said that provisions intended to secure the citizen additional rights and safeguards against the exercise of the power in question, or affecting the remedy or procedure only, will be deemed to go into operation immediately and without the aid of legislation, unless the operation of such provisions is expressly made dependent upon laws to be afterwards enacted. Thus where, by a change in the constitution, the compensation or damages for property taken is required to be ascertained in a particular mode, all laws inconsistent therewith are at once abrogated;<sup>13</sup> and proceedings under such laws thereafter are void and of no effect even collaterally.<sup>14</sup> But a party by participating in proceedings under such a statute and invoking the benefit thereof will thereafter be estopped to assert its invalidity.<sup>15</sup> A constitution will not be so construed as to have a retroactive effect.<sup>16</sup>

The constitution of Arkansas of 1868 provided that the

<sup>12</sup> See Cooley, Const. Lim. chap. 4.

<sup>13</sup> Kline v. Defenbaugh, 64 Ills. 291; Mitchell v. Illinois etc. Co., 68 Ills. 286; Householder v. City of Kansas, 83 Mo. 488; St. Joseph & I. R. R. Co. v. Cudmore, 103 Mo. 634, 15 S. W. Rep. 535; People v. Supervisors, 12 Barb. 446; Lamb v. Lane, 4 Ohio St. 167. But see as to proceedings pending on appeal. People v. Supervisors, 3 Barb. 332. In the following case the right to go on with pending proceedings was held to be secured by a saving

clause. Peoria etc. R. R. Co. v. Birhett, 62 Ills. 332.

<sup>14</sup> Mitchell v. Illinois etc. Co., 68 Ills. 286; People v. Kimball, 4 Mich. 95; Perrysburg Canal and Hydraulic Co. v. Fitzgerald, 10 Ohio St. 513; Whitehead v. The Arkansas Central R. R. Co., 28 Ark. 460; Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin Co., 59 Cal. 320.

<sup>15</sup> Minneapolis, etc., R. R. Co. v. Nester, 3 N. D. 480, 57 N. W. Rep. 510.

<sup>16</sup> Toledo, etc. R. R. Co. v. Pence, 68 Ills. 524.

compensation for a right of way appropriated by a corporation should be ascertained by a jury of twelve men in a court of record as should be prescribed by law.<sup>17</sup> The Cairo & Fulton R. R. Co. was organized under an act of 1855 which provided for the assessment of damages by five commissioners on the application of either party. In 1874 Trout filed his petition against the said company under the act of 1855 for an assessment of damages. An act was passed in 1873 applicable to all railroads, which provided a mode of assessing damages in accordance with the constitution, but it gave the initiative to the railroad company alone. The petitioners' land was entered upon before the passage of this act. The court held that the constitution did not execute itself, but plainly indicated that it was to be carried into effect only by legislation. It was further held that as the petitioner's right accrued before the act of 1873 was passed, he could proceed under the act in force at the time his right accrued.<sup>18</sup> Where by the adoption of a new constitution compensation is required to be made for property injured or damaged as well as for property taken, it has been held that it did not apply to damages occasioned by works which had been ordered and contracted for before the new constitution went into effect.<sup>19</sup> But where an ordinance was passed for a change of grade before the new constitution went into effect, and the change was not made until afterwards, it was held that the new constitution applied and that the municipality would be liable for damages to abutting property thereby occasioned.<sup>20</sup> The right to

<sup>17</sup> Art. V, Sec. 48; see post, § 16.

<sup>18</sup> *Cairo & Fulton R. R. Co. v. Trout*, 32 Ark. 17. In *Supervisors of Dodridge County v. Stout*, 9 W. Va. 703, it was held that where, pending proceedings to condemn, a new constitution went into effect requiring compensation to be ascertained in such manner as should be prescribed by general law, provided,

that either party should have the right to a jury of twelve freeholders, the existing laws remained in force until a general law was passed as contemplated by the constitution.

<sup>19</sup> *Chicago v. Rumsey*, 87 Ills. 348.

<sup>20</sup> *City of Bloomington v. Pollock*, 141 Ills. 346, 31 N. E. Rep. 146; *S. C. 38 Ills. App. 133*. Compare *Stroudsbough Borough v.*



impose upon existing corporations, by an amendment to the constitution or otherwise, a liability for consequential damages, where none existed before, is considered in a future section.<sup>21</sup>

§ 13. The provisions apply only to the power of eminent domain.—As we have already seen, private property may be taken or affected for public use, not only under the power of eminent domain, but also under other powers vested in the State, as the power of taxation, the police power and the war power.<sup>22</sup> Some courts have held that the constitutional provision in question is a limitation upon the exercise of all these powers.<sup>23</sup> But the better view undoubtedly is that

Stroudsbouurg Pass. R. R. Co., 12 Pa. Co. Ct. 124; *St. Louis v. Lang*, 131 Mo. 412, 33 S. W. Rep. 54; *Ogden v. Philadelphia*, 143 Pa. St. 430, 22 Atl. Rep. 694.

<sup>21</sup> Post § 246. See *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75, 10 S. C. Rep. 34, 1 Am. R. R. & Corp. Rep. 15; *Prather v. Jeffersonville, etc. R. R. Co.*, 52 Ind. 16; *Den v. Morris Canal etc. Co.*, 24 N. J. L. 587; *Duncan v. Pennsylvania R. R. Co.*, 94 Pa. St. 435; *Philadelphia v. Wright*, 100 Pa. St. 235; *McElroy v. Kansas City*, 21 Fed. R. 257.

<sup>22</sup> Ante, Chap. 1.

<sup>23</sup> In *Macon v. Patty*, 57 Miss. 378, 399, the court says: "We must apply this provision in all cases, notwithstanding it has been said that it is only applicable to property taken under the right of eminent domain, which right does not extend to the taking of money. We agree that the most important use of this provision is to restrain the right of eminent domain; but that is not its whole force. For the prohibition is general and absolute:

'Private property shall not be taken for public use, except upon due compensation,' is the language of the constitution. The prohibition is not as to the methods in which the appropriation may be made, but is a denial of the power to make it at all by any method, under any circumstances, and under any pretence whatever, unless compensation is first made. It was intended to secure the absolute inviolability of private property of all kinds against any and all invasions under public authority. If the right of eminent domain does not extend to the taking of money, this is no reason why that kind of property should not come within the protection of this clause of the constitution; but, on the contrary, the absence of the right is but an additional safeguard for its protection. It is true that money exacted from the citizen, in the way of lawful and constitutional taxation, is not within the meaning of this clause, because it is taken in discharge of a debt to the State or

it applies only to the power of eminent domain.<sup>24</sup> The just compensation required to be made is an equivalent, either in money, or in special benefits to particular property.<sup>25</sup> In no case is the individual compensated in this manner for money exacted for taxation or loss occasioned by an exercise of police power. In short, these powers would be rendered nugatory, if such compensation was obligatory in case of their exercise. It is enough that a tax or police regulation promotes, or is calculated or intended to promote, the general welfare. The individual receives his only compensation by sharing in the common benefit. But, if the constitutional provision for just compensation is satisfied by a participation in the general welfare, then its efficacy to protect the individual against the power of eminent domain is entirely gone. As the provision must have a uniform interpretation and cannot be made to mean one thing at one time and another thing at another time, one thing when applied to the power of eminent domain and another when applied to taxation or police regulation, we think it is clear that its application must be confined to the former power. It does serve to keep the other powers within their legitimate bounds, but within those bounds it has no application.<sup>26</sup> These conclusions are enforced by considering those provisions which require the "just compensation" to be first made. It can hardly be contended that this modification changes entirely the scope and purposes of the provision. But it is evident that it would absolutely pre-

public. But if, under the guise of taxation, money is attempted to be exacted beyond the limits of the taxing power, it is a violation of the security afforded by this clause of the constitution." See also *Cheaney v. Hooser*, 9 B. Mon. 330, 341; *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. Rep. 368.

<sup>24</sup> "It is only the taking of specific pieces of property of an individual that is prohibited by the constitutional provision men-

tioned." *City of Logansport v. Seybold*, 59 Ind. 225, 228; *City of Aurora v. West*, 9 Ind. 74, 83.

<sup>25</sup> We do not mean at this point to give a construction of the words in question. All we mean is that the least effect courts have ever given to them, is that the "just compensation" required to be made may consist of special benefits. See post §§ 465, 471.

<sup>26</sup> See post, §§ 155, 156.

clude the exercise of the power of taxation or police regulation, if applied thereto; for it is impossible to receive the benefit of a tax until it has been collected and expended, or of a police regulation until it has been made and enforced.

**§ 14. Constitutional Provisions.—United States.**

Art. 5. Amendments of 1791. \* \* \* “nor shall private property be taken for public use, without just compensation.”

Ordinance of 1787. Sec. 9, Art. 2. “No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”

**§ 15. Alabama.**

1819. Art. 1, § 13. \* \* \* “nor shall any person’s property be taken or applied to public use, unless just compensation be made therefor.”

1865. Art. 1, § 25. “That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations, and for works of internal improvement, the right to establish depots, stations and turn-outs; but just compensation shall, in such cases be first made to the owner.”

1867. Art. 1, § 25. The same provision is continued, except for “other persons or corporations” read “either persons or corporations,” and in the last line in place of “such cases” read “all cases.”

Art. 13, § 5. “No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvements proposed by such corporation; which compensation



shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1875. Art. 1, § 24. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as individuals. But private property shall not be taken for or applied to public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations other than municipal, or for the benefit of any individual or association."

Art. 13, § 7. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporation or individuals, made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to law."

§ 16. Arkansas.

1836. No provision.

1864. No provision.

1868. Art. 1, § 15. "Private property shall not be taken for public use without just compensation therefor."

Art. 5, § 48. \* \* \* "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1874. Art. 2, § 22. "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefor."

Art. 12, § 9. "No property nor right of way shall be appropriated to the use of any corporations until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

§ 11. "Foreign corporations \* \* \* shall not have power to condemn or appropriate private property."

Art. 17, § 9. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 12. "All railroads, which are now or may be hereafter built and operated either in whole or in part, in this State, shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the general assembly."

§ 17. California.

1849. Art. 1, § 8. \* \* \* "nor shall private property be taken for public use without just compensation."

1879. Art. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation hav-



ing been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained or paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

Art. 12, § 8. "The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

Art. 14, § 1. "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

§ 18. Colorado.

1876. Art. 2, § 14. "That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the land of others, for agricultural, mining, milling, domestic, or sanitary purposes."

§ 15. "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such

without regard to any legislative assertion that the use is public."

Art. 15, § 8. "The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 19. Connecticut.

1818. Art. 1, § 11. "The property of no person shall be taken for public use without just compensation therefor."

§ 20. Delaware.

1776. No provision.

1792. Art. 1, § 8 \* \* \* "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made."

1831. Art. 1, § 8. Same.

1897. Art. 1, § 8. Same.

§ 21. Florida.

1838. Art. 1, § 14. "That private property shall not be taken or applied to public use unless just compensation be made therefor."

1865. Art. 1, § 14. "That private property shall not be taken or applied to public use, unless just compensation be first made therefor."

1868. Art. 1, § 9. \* \* \* "nor shall private property be taken without just compensation."

1886. Declaration of rights, § 12. \* \* \* "Nor shall private property be taken without just compensation."

Art. 16, § 29. "No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by any such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."



## § 22. Georgia.

1777. No provision.

1789. No provision.

1798. No provision.

1865. Art. 1, § 17. "In cases of necessity, private ways may be granted upon just compensation being first paid; and with this exception private property shall not be taken, save for public use, and then only on just compensation, to be first provided and paid, unless there be a pressing, unforeseen necessity; in which event the general assembly shall make early provision for such compensation."

1868. Art. 1, § 20. "Private ways may be granted upon just compensation being paid by the applicant."

1877. Art. 1, Sec. III, ¶ 1. "In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid."

Art. III, Sec. VII, ¶ 20. "The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Art IV, Sec. II, ¶ 2. "The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as property of individuals." \* \* \*

## § 22a. Idaho.

1889. Art. 1, § 14. "The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the State, or the preservation of the health of



its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the State.

"Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor."

Art. 11, § 8. "The right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchise of incorporated companies and subjecting them to public use, the same as property of individuals.

See also the whole of article 15 as to water rights.

§ 23. Illinois.

1818. Art. 8, § 11. \* \* \* "nor shall any man's property be taken or applied to public use, without the consent of his representatives in the general assembly, nor without just compensation being made to him."

1848. Art. 13, § 11. Same.

1870. Art. 2, § 13. "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it was taken."

Art. 4, § 30. "The general assembly may provide for establishing and opening roads and cartways, connected with a public road, for private or public use."

Art. 11, § 14. "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Art. 4, § 31, as amended in 1878. "The General Assembly may pass laws permitting the owners of lands to construct

drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby."

§ 24. Indiana.

1816. Art. 1, § 7. "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

1851. Art. 1, § 21. "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

§ 25. Iowa.

1846. Art. 1, § 18. "Private property shall not be taken for public use without just compensation first being made, or secured, to be paid to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

1857. Art. 1, § 18. Same.

§ 26. Kansas.

1859. Art. 12, § 4. "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation."

§ 27. Kentucky.

1792. Art. 12, § 12. \* \* \* "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

1799. Art 10, § 12. Same.

1850. Art 13, § 14. Same.

1891. § 195. "The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises of incorporated companies for public use which it has and retains to take the property of individuals."

§ 242. Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The general assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by commissioners or otherwise; and upon appeal from such preliminary assessment the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

§ 28. Louisiana.

Civil Code, Art. 489. "No one can be divested of his property, unless for some purpose of public utility and on consideration of an equitable and previous indemnity and in a manner previously prescribed by law. By an equitable indemnity in this case is understood, not only a payment for the value of the thing of which the owner is deprived, but a remuneration for the damages which may be caused thereby."

1812. No provision.

1845. Title 6, Art. 109. "Vested rights shall not be divested unless for purposes of public utility, and for adequate compensation previously made."

1852. Title 6, Art. 105. Same.

1864. Title 6, Art. 109. Same.

1868. Title 6, Art. 110. Same, omitting the word previously.

1879. Art. 156. "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."



§ 29. **Maine.**

1819. Art. 1, § 21. "Private property shall not be taken for public use without just compensation, nor unless the public exigencies require it."

§ 30. **Maryland.**

1776. No provision.

1851. Art. 3, § 46. "The legislature shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between the parties or awarded by a jury, beind first paid or tendered to the party entitled to such compensation."

1864. Art. 3, § 39. Same.

1867. Art. 3, § 40. Same.

§ 31. **Massachusetts.**

1780. Part 1st, Art. 10. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal services or an equivalent when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the public of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

§ 32. **Michigan.**

1835. Art. 1, § 19. "The property of no person shall be taken for public use without just compensation therefor."

1850. Art. 10, § 11. "The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law."

Art. 15, § 9. "The property of no person shall be taken by any corporation for public use without compensation

being first made or secured, in such manner as may be prescribed by law."

Art. 15, § 15. "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

Art. 18, § 2. "When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law. Provided, The foregoing provisions shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duties as highway commissioners." (Proviso added in 1860.)

Art. 18, § 14. "The property of no person shall be taken for public use without just compensation therefor. Private roads may be opened in the manner to be prescribed by law; but in every case the necessities of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefited."

§ 33. Minnesota.

1857. Art. 1, § 13. "Private property shall not be taken for public use without just compensation therefor, first paid or secured."

Art. 10, § 4. "Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land and the damages arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms."

## § 34. Mississippi.

1817. Art. 1, § 13. \* \* \* "nor shall any person's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made therefor."

1832. Art. 1, § 13. \* \* \* "nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made therefor."

1868. Art. 1, § 10. "Private property shall not be taken for public use except upon due compensation first being made to the owner or owners thereof in a manner to be provided by law."

1890. Art. 3, § 17. "Private property shall not be taken or damaged for public use except upon due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

Art. 7, § 190. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use."

Art. 11, § 233. "The levee boards shall have and are hereby granted authority and full power to appropriate private property in their respective districts for the purpose of constructing, maintaining and repairing levees therein; \* \* \*."

## § 35. Missouri.

1820. Art. 13, § 7. \* \* \* "and that no private property ought to be taken or applied to public use without just compensation."

1865. Art. 1, § 16. Same.

1875. Art. 2, § 20. "That no private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of

necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

Art. 2, § 21. "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Art. 12, § 4. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

§ 35a. **Montana.**

1889. Art. 3, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into, court for the owner."

Art. 3, § 15. "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith,



as well as the sites for reservoirs necessary for collecting and storing the same, shall be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

Art. 15, § 9. "The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

§ 36. Nebraska.

1867. Art. 1, § 13. "The property of no person shall be taken for public use without just compensation therefor."

Art. 2, § 3. "The people of the State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

1875. Art. 1, § 21. "The property of no person shall be taken or damaged for public use without just compensation therefor."

Art. 11, § 6. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature of the property and franchises of incorporated companies already organized or hereafter to be organized, and subjecting them to the public necessity, the same as of individuals."

Art. 11, § 8. "No railroad corporation organized under the laws of any other State, or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this State."

§ 37. Nevada.

1864. Art. 1, § 8. \* \* \* "nor shall private property be taken for public use without just compensation having been first made or secured, except in cases of war, riot, fire,



or great public peril, in which case compensation shall afterwards be made."

Art. 8, § 7. "No right of way shall be appropriated to the use of any corporation until full compensation be first made or secured therefor."

§ 38. **New Hampshire.**

1776. No provision.

1784. Part I, Art. 12. \* \* \* "but no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."

1792. Part I, Art. 12. Same.

§ 39. **New Jersey.**

1776. No provision.

1844. Art. 1, § 16. "Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the Legislature shall direct compensation to be made."

Art. 4, § 7, cl. 9. "Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owner."

§ 40. **New York.**

1777. No provision.

1821. Art. 7, § 7. \* \* \* "nor shall private property be taken for public use without just compensation."

1846. Art. 1, § 6. Same.

Art. 1, § 7. "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity for the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

Art. 1, § 11. "The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State."

1894. Same, with the following added to Section 7: General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

§ 41. North Carolina.

1776. No provision.

1868. No provision.

1876. No provision.

§ 41a. North Dakota.

1889. Art. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived."

Art. 7, § 134. "The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 42. Ohio.

1802. Art. 8, § 4. "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner."

1851. Art. 1, § 19. "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively

requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Art. 13, § 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor shall be first made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

§ 43. Oregon.

1857. Art. 1, § 19. "Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor except in case of the State, without such compensation first assessed and tendered."

Art. 11, § 4. "No person's property shall be taken by any corporation under authority of law, without compensation being first made or secured, in such manner as may be prescribed by law."

§ 44. Pennsylvania.

1776. Art. 8. \* \* \* "but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."

1790. Art. 9, § 10. \* \* \* "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."

1838. Art. 7, § 4. "The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners

of said property, or give adequate security therefor, before such property shall be taken."

Art. 9, § 10. Same as in 1790.

1873. Art. 1, § 10. \* \* \* "nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured."

Art. 16, § 3. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 8. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law."

§ 45. Rhode Island.

1842. Art. 1, § 16. "Private property shall not be taken for public uses, without just compensation."

§ 46. South Carolina.

1776. No provision.

1778. No provision.

1790. No provision.

1865. No provision.

1868. Art. 1, § 23. "Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: Provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or cor-

porations, and for works of internal improvement, the right to establish depots, stations, turnouts, etc.; but a just compensation shall, in all cases, be first made to the owner."

Art. 6, § 3. "The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

Art. 12, § 3. "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

§ 46a. South Dakota.

1889. Art. 6, § 13. "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken."

Art. 17, § 4. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

Art. 17, § 18. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, and the

amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases."

§ 47. Tennessee.

1796. Art. 11, § 21. "That no man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

1834. Art. 1, § 21. Same.

1870. Art. 1, § 21. Same.

§ 48. Texas.

1836. Republic of Texas, Declaration of Rights, 13th. "No person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representatives, without just compensation being made therefor according to law."

1845. State of Texas, Art. 1, § 14. "No person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person."

1866. Art. 1, § 14. Same.

1868. Art. 1, § 14. Same.

1876. Art. 1, § 17. "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured, by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

§ 49. Vermont.

1777. Chap. 1, § 2. "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."

1786. Chap. 1, § 2. Same.

1793. Chap. 1, § 2. Same, except for "any particular man's property" read "any person's property."

§ 50. Virginia.

1776. Bill of Rights, § 6. \* \* \* "that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."

1850. Bill of Rights, § 6. Same.

1870. Art. 1, § 8. Same.

§ 50a. Utah.

1895. Art. 1, § 22. "Private property shall not be taken or damaged for public use without just compensation."

Art. 12, § 11. "The exercise of the right of eminent domain shall never be so abridged or construed, as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

§ 50b. Washington.

Art. 1, § 16. "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use, without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases, in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question,

and determined as such without regard to any legislative assertion that the use is public."

Art. 12, § 10. "The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

Art. 22, § 1. "The use of the waters of this State for irrigation, mining and manufacturing purposes shall be deemed a public use."

§ 51. West Virginia.

1861-3. Art. 2, § 6. "Private property shall not be taken for public use without just compensation."

1872. Art. 3, § 9. "Private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company incorporated for the purposes of internal improvement until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, that when required by either of the parties such compensation shall be ascertained by an impartial jury of twelve freeholders."

Art. 11, § 12. "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals."

§ 52. Wisconsin.

1848. Art. 1, § 13. "The property of no person shall be taken for public use without just compensation therefor."

Art. 9, § 3. "The people of this State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

Art. 11, § 2. "No municipal corporation shall take private property for public use against the consent of the



owner, without the necessity thereof being first established by the verdict of a jury."

**§ 52a. Wyoming.**

Art. 1, § 32. "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation."

Art. 1, § 32. "Private property shall not be taken or damaged for public or private use without just compensation."

Art. 8, § 1. "The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State."

§§ 2 to 5 of the same article provide for the control and utilization of such waters.

Art. 10, § 9. "The right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to the public use the same as the property of individuals."

## CHAPTER III.

### WHAT CONSTITUTES A TAKING: GENERAL PRINCIPLES.

§ 53. *Statement of the question.*—The constitutional limitations upon the power of eminent domain, which have been considered in the last chapter, though seemingly plain and definite, nevertheless contain three important ambiguities. These are found in the word “taken” and in the phrases “public use” and “just compensation.” The first of these, or what constitutes a taking of property, within the meaning of the constitution, will form the subject of inquiry in the present and succeeding chapters. In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*; if not appropriated, it can be removed beyond the influence of any particular improvement and so escape the deterioration or injury it might otherwise sustain.<sup>1</sup> Nor does any question arise in regard to real property when some legal estate or interest therein is acquired, or a physical appropriation made. But it frequently happens when land has been taken for some public purpose, that the use of the land for that purpose, or the adaptation of the land for such use, may occasion damage to adjacent property, the title and possession of which remain wholly unaffected. Such damage may consist of a real structural or physical injury to the property, of an interference with certain rights appurtenant thereto, or enjoyed in connection therewith, or of a mere deterioration in value. Do such damages, whether structural or otherwise, come within the purview of the constitution? Are they, in any case, a *taking* for which compensation must be made?

§ 54. *What is property?*—In determining the question of what constitutes a taking of property, it is important

<sup>1</sup> The constitution protects personally as fully as real estate. *Co.*, 35 W. Va. 433, 14 S. E. Rep. 146.  
*Teter v. W. Va. Cent. & P. R.*

to have at the outset, a clear understanding of what *property* really is. The term is applied with many different meanings.<sup>2</sup> "Sometimes," says Austin, "it is taken in a loose and vulgar acceptation to denote not the right of property or dominium, but the subject of such a right; as where a horse or piece of land is called my property."<sup>3</sup> A little reflection, however, will suffice to convince any one that property is not the corporeal thing itself of which it is predicated, but certain rights in or over the thing. Land undergoes no corporeal change by the mere fact of being reduced to the dominion and ownership of man. An animal *feræ naturæ* may be precisely the same before and after capture, but in his former state no one would speak of him as property. We must, therefore, look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law.<sup>4</sup> These rights are the right of user, the right of exclusion and the right of disposition.<sup>5</sup> These rights are not possessed in an absolute degree, but are limited. The right of user is limited by those regulations

<sup>2</sup> At the close of his forty-seventh lecture, Mr. Austin enumerates some of the "various meanings of the very ambiguous word property." <sup>2</sup> Austin's Jurisprudence, § 1051.

<sup>3</sup> Austin's Jur., § 1051.

<sup>4</sup> We do not mean to be understood as announcing the doctrine that property was originally created by law. Property and the laws of property grew up together out of a primitive condition of things in which neither existed. See Laveleye's *Primitive Property*, Morgan's *Ancient Society*, and Works of Sir Henry Maine. What we mean to assert is that now property is exactly what the law makes it.

<sup>5</sup> "The integral or entire right

of property," says Bentham, "includes four particulars: 1. Right of occupation. 2. Right of excluding others. 3. Right of disposition, or the right of transferring the integral right to other persons. 4. Right of transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part to those in whose possession he would have wished to place it." <sup>3</sup> Bentham's Works, ed. 1843, Edinburgh, p. 182. The same author also says: "Property is entirely the creature of the law. \* \* \* There is no form, or color, or visible trace, by which it is possible to express the relation which constitutes property.

which are enacted for the general good and by those restraints which are imposed by the common law under the maxim, *sic utere tuo ut alienum non laedas*. It may also be limited in various ways by contract and testamentary dispositions. The right of exclusion must yield to the requirements of legal process and to the law of necessity. The right of disposition may be limited and regulated in

It belongs not to physics, but to metaphysics: it is altogether a creature of the mind. \* \* \* I can reckon upon the enjoyment of that which I regard as my own, only according to the promise of the law, which guarantees it to me. It is the law alone which allows me to forget my natural weakness; it is from the law alone that I can enclose a field and give myself to its cultivation, in the distant hope of the harvest." *Principles of the Civil Code*, chap. viii. Works, vol. 1, p. 308. "Property signifies the right or interest which one has in land or chattels. In this sense it is used by the learned and unlearned, by men of all ranks and conditions. We find it so defined in dictionaries, and so understood by the best authors." *Tilghman C. J. in Morrison v. Semple*, 6 Binn. (Pa.) 94, 98, 1813. This definition is approved by the court in *Jackson v. Housel*, 17 Johns. 281, 283, 1820, and *Spencer C. J. in that case* adds the following: "Property is defined to be the highest right a man can have to a thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy." "Property itself in a legal sense is nothing more than the ex-

clusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing." *Chicago & Western Indiana R. R. Co. v. Englewood Connecting Ry. Co.*, 115 Ills. 375, 385. "Property, in its broader and more appropriate sense, is not alone the chattel or land itself, but the right to freely possess, use and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible." *City of Denver v. Bayer*, 7 Col. 113. "Sometimes the term is applied to the thing itself, as to a horse or tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations of invisible rights, 'the evidence of things not seen.' Property, then, in a determinate object, is composed of certain constituent elements, to-wit., the unrestricted right of use, enjoyment and disposal, of that object." *City of St. Louis v. Hill*, 116 Mo., 527, 22 S. W. Rep. 861, 8 Am. R. R. & Corp. Rep. 422. See also *Wynehamer v. The People*, 13 N. Y. 378, 433; *Eaton v. B. C. & M. R. R.*, 51 N. H. 504, 511; 1 Bl. Com. 138; *Austin's*

the same way as the right of use.<sup>6</sup> A person's right of property in things, therefore, consists of the right to possess, use and dispose thereof in such manner as is not inconsistent with the law of the land.

As regards real property, in addition to the rights already enumerated, which pertain to the use and disposition of that limited area which a man calls his own, there are others which pertain to the use which may lawfully be made of contiguous and surrounding areas and which form an important part of that aggregate of rights constituting property in land. Such are the rights to the support of soil, to light and air, the right to be undisturbed by nuisances or the unreasonable use of neighboring property, the right to the protection afforded by natural barriers against tide and flood, waves and currents, rights in tide waters and running streams and various rights respecting waters flowing upon the surface or percolating through the soil in no defined channel. These rights, wherever they exist, and to the extent to which they are secured by law, are part and parcel of the owner's property in land.<sup>7</sup>

§ 55. **Meaning of the word property in the constitution.**—Having indicated the true meaning of the word property, it remains to inquire what meaning it has in the constitution. Undoubtedly, in such an instrument, it should be

Jurisprudence, secs. 47 and 48; *Tripp v. Overocker*, 7 Col. 72; *East St. Louis v. O'Flynn*, 19 Ills. App. 64; *Caro v. Metropolitan El. R. R. Co.*, 46 N. Y. Super. Ct. 138; *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457; *Lycoming Gas & W. Co. v. Moyer*, 99 Pa. St. 615; *Ritchie v. People*, 155 Ills. 98, 40 N. E. Rep. 454; *Dibsell v. Morris' Heirs*, 89 Tenn. 497, 15 S. W. Rep. 87; *Rutherford*, b. 1, c. iv, § 1. "Full property in a thing," says the author last cited, "is a perpetual right to use it to any purpose and to dispose of it at pleasure."

<sup>6</sup> 2 Austin's Jurisp. 825, 826, sec. 48; 3 Bentham's Works, p. 182 et seq.; *Rutherford*, b. 1, c. iv.

<sup>7</sup> An interesting and instructive article by Mr. A. G. Sedgwick in which he considers the different meanings of the word property will be found in the *North American Review* for September, 1882. Vol. 135 p. 253.

The views of this section are very fully adopted in the cases of *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. Rep. 861, and *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457.

given a meaning that accords with the ordinary usage and understanding of the people who made the instrument. We do not refer to the small body of persons who actually formulated the instrument, but the large body of citizens who gave it vitality by their votes. The sovereign people say to their agents and servants, the executive and legislative officers of the State: We delegate to you all of our sovereign powers, but you must not take our private property for public use without making us a just compensation therefor. What did they mean by property? The dullest individual among the people knows and understands that his property in anything is a bundle of rights. It is no more common for ordinary people to speak of things as property than it is for them to speak of their rights in things, as the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that, etc. Although, as Austin says, all men speak loosely of things as property, yet practically all men understand that property consists of certain rights in things which are secured by law. They constantly act upon this understanding, although they may never have formulated a definition of the word and would be at a loss to do so. However unable a man may be to formulate his ideas, yet if you turn a stream of water on his land, or defile his atmosphere with gas or smoke, or create other like disturbance, you will soon find that he has a very clear idea of his right to be exempt from such intrusion. Now it seems to us that the word property in the constitution should be given a meaning which, while in accord with the sense in which it is practically used and understood by the people, will also secure to the individual the largest degree of protection against the exercise of the power intended to be restricted. The meaning which, in our opinion, fulfills both of these conditions, is the one set forth in the preceding section.<sup>8</sup> Chief Justice Shaw, of Massachusetts,

<sup>8</sup> See the article referred to in the last note. In that article Mr. Sedgwick says: "If the views here suggested are sound, the

process of interpretation through which the constitutional provision as to taking 'property' is passing, is one under which what

in speaking on this subject says: "The word 'property,' in the tenth article of the Bill of Rights, which provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."<sup>9</sup>

§ 56. Principles which determine when there has been a taking.—If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation.<sup>10</sup>

Austin calls the true or strict sense of the word is being substituted for the vulgar acceptance in which the subject of property is confounded with the property itself. That the second of these two views must in the end prevail and render the first obsolete, no one who has paid much attention to the development of the law on the subject in this country can for a moment doubt."

<sup>9</sup> *Old Colony & Fall River R. R. Co. v. County of Plymouth*, 14 Gray, 155, 161. "The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government, and the

word 'taking' should not be used in an unreasonable or narrow sense." *Pearsall v. Board of Supervisors*, 74 Mich. 553, 42 N. W. Rep. 77.

<sup>10</sup> "Property, then, in a determinate object, is composed of certain constituent elements, to-wit., the unrestricted right of use, enjoyment, and disposal, of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction pro tanto of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the locus in

It will thus be seen that, in order that there may be a recovery of compensation for damages to property no part of which is taken, such damages must be the result of a violation of some one or more of the rights which constitute property. In other words, the damage must be actionable damage, that is, damage which would be remediable if done by an individual without any pretense of statutory authority. If, for damage caused to my land by certain acts of my neighbor done upon his own land for his own use, I may have compensation, and if, for the same damage caused by the same acts done upon the same land by the public or its agents for public use I can have no compensation, it is plain that the right upon which the former action was founded has been taken from me, that so much has been subtracted from my property in the land. Every such taking we hold to be within the constitutional prohibition requiring compensation to be made. In any given case, therefore, where the land of an individual has been damaged or diminished in value by the construction or operation of works for public use, whether he is entitled to compensation or not will depend upon whether the damage or deterioration is due to an interference with any right appurtenant to the land or parcel of his property in it. If this question can be answered in the affirmative, there is a right to compensation; otherwise, not. Thus, if a city takes a lot adjacent to my own and, under proper authority, erects thereon works, the operation of which necessarily fills my premises with noxious gases, whereby my property is depreciated in value, I am entitled to compensation, because my right not to be damaged by an unreasonable use of the adjacent lot has been violated. But if the city erects upon

quo." *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. Rep. 861, 8 Am. R. R. & Corp. Rep. 422. Similar expressions of opinion will be found in the following cases: *Forster v. Scott*, 136 N. Y. 577, 32 N. E. Rep. 976, 8 Am. R. R. & Corp. Rep. 428 note; *Pearsall v. Board of Supervisors*,

74 Mich. 558, 42 N. W. Rep. 77; *Eollinger v. Southern Pipe Line Co.*, 2 Pa. Dist. Ct. 604; *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457; *Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128. See also the succeeding sections.



the same lot a school-house and uses it for school purposes and thereby my premises are lessened in value, I am remediless, because no right whatever which I had, as owner of my lot, respecting the use which could be made of the adjoining lot, has been violated. A school is not a nuisance in a legal sense, and the city, in the case supposed, has done no more than any individual could have done upon the same premises.<sup>11</sup>

§ 57. *Changes which the law has undergone.*—The law as to what constitutes a taking has been undergoing radical changes in the last few years. Mr. Sedgwick, writing some thirty years ago, in speaking of this subject, says: "It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain."<sup>12</sup> The Supreme Court of Maine, in interpreting the constitutional provision in question, in 1852, said: "The design appears to have been simply to declare, that private property shall not be changed to public property, or transferred from the owner to others, for public use, without just compensation."<sup>13</sup> These quotations present a fair statement of the condition of the law thirty years ago.<sup>14</sup> The learned author just quoted, after reviewing the decisions which he has summed up in the above quotation, ventures his own opinion upon the subject as follows: "To

<sup>11</sup> We do not remember any decision which exactly covers the illustration used, but there are cases which involve the same principle. Thus it has been decided that a suit will not lie either to prevent, or to recover damages for, the erection of a jail upon adjoining property. *Wehn v. Commissioners of Gage Co.*, 5 Neb. 494; *Burwell v. Com-*

*missioners*, 93 N. C. 73. See post §§ 151-152, 235, 236.

<sup>12</sup> Sedgwick Const. Law, 2d ed. p. 456-458.

<sup>13</sup> *Cushman v. Smith*, 34 Me. 247, 258.

<sup>14</sup> This was written in 1888. In the recent case of *Hart v. Atlanta*, 100 Ga. 274, it is said that a "taking" "means a physical, tangible appropriation of the property of another."

differ from the voice of so many learned and sagacious magistrates may almost wear the aspect of presumption; but I can not refrain from the expression of the opinion, that this limitation of the term taking to the actual physical appropriation of the property or a divesting of title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government. The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that, in point of fact, the owner is deprived of property, though a particular piece of property may not be actually taken."<sup>15</sup>

Numerous cases decided in the last twenty years have vindicated Mr. Sedgwick's view of what the law should be. In stating, in the last section, the conclusions at which we have arrived after a careful examination of all the decided cases, and in discussing the principles upon which those conclusions are based, we have not referred to the decisions, because they must be referred to under the different divisions of the subject to which they respectively pertain, and because the soundness of the conclusions we have announced must be tested, not by the few cases which discuss general principles, but by the points actually adjudicated in all the cases. But, in view of the great importance of the question, the numerous cases which call for its solution, and the magnitude of the interests involved, we shall, at the risk of some repetition, refer to some of the leading cases in support of the views we have expressed.

§ 58. **Leading cases.**—The leading case upon the subject, and the one which has contributed more than any other towards bringing about the change referred to in the last section, is *Eaton v. B. C. & M. R. R. Co.*, 51 N. H.

<sup>15</sup> Sedgwick Const. Law, 2d ed. p. 462-463.

504, decided by the Supreme Court of New Hampshire in 1872. In referring to this case, Judge Christiancy, of Michigan, says: "But the most satisfactory and best considered case which can be found in the books upon this subject, which examines, classifies and analyzes nearly all the cases, and in the conclusions of which I wholly agree, is that of *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504."<sup>16</sup>

The defendant, a railroad company, laid out its road through the plaintiff's farm, whose damages were duly assessed, paid and released. But in constructing their road the company cut through a ridge north of plaintiff's farm, through which in times of freshet the waters of an adjacent river found their way, flooding the plaintiff's land and bringing down and lodging upon it quantities of earth and stones, thereby rendering the land unfit for cultivation or use. The plaintiff brought suit to recover for this damage, and the court held in an elaborately considered opinion that he was entitled to succeed. It was conceded in the case "that, if the cut through the ridge had been made by a private landowner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action." "The vital issue then is," says the court, "whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. To constitute 'a taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the meaning of the term 'property,' as used in the various State constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right of any person

<sup>16</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 321.

to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer v. The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d Ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d Ed. 836; Wells, J., in *Walker v. O. C. W. R. R. Co.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, ipso facto, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a taking of 'property.' Why not the former? \* \* \* \* The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substan-

tial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. \* \* \* The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. \* \* \* \* We think there has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the ruling of the court was correct." The true ground of this decision is that the plaintiff as owner of this farm had a right to the protection of the natural barrier against the overflow upon his land of the river in question, that this right was a part of the property in his land, and that the acts of the defendant company amounted to a taking of this right and consequently to a taking of his property in the land *pro tanto*, for which he was entitled to compensation under the constitution.

§ 59. *Leading cases, continued.*—The decision in the Eaton case was reviewed two years later by the same court, in the case of *Thompson v. The Androscoggin River Improvement Company*, 54 N. H. 545, 1874, and the true principles of the decision set forth with great clearness and ability. As the Eaton case has exerted so large an influence upon this branch of the law of eminent domain since its rendition, we shall give the views of the court at length from the case last cited:

"Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment

of land by the entire community of proprietors. Two of Eaton's proprietary rights in the tract of land described as his farm—his right of exclusive possession and his right of reasonable use of the soil—included the right that the soil should not be injured by R either appropriating it to his own use, or committing a trespass upon it, or making an unreasonable use of his own land. When Eaton's right of not being injured by an unreasonable use of R's land was invaded, his property was taken, in the same legal sense in which it would have been taken if his right of not being injured by a trespass or appropriation had been infringed. If Eaton's farm had been damaged by R's reasonable use of his own land, Eaton would have had no cause of action; his rights would not have been invaded by R exercising his right of reasonably using his own. The proprietary rights of each were limited in that manner. They were not absolute in respect to each one's use of his own; they included a right in respect to the use of the other's. The soil is often called property; and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes necessary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. A refusal to pay a debt is an injury to the property of the creditor. 25 N. H. 540. A patent right, a copy right, a right of action, an easement, an incorporeal hereditament, may be property as valuable as a granite quarry; and the owner of such property may be practically deprived of it,—such property may be practically taken from its owner,—although it is not corporeal. So those proprietary rights, which are the only valuable attributes or ingredients of a land-owner's property, may be taken from him, without an asportation or adverse personal occupation of that portion of the earth which is his, in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. Property is taken, when any one of those proprietary rights is

taken, of which property consists. *Arimond v. Green Bay, etc., Co.*, 31 Wis. 316, 335. Eaton's right of not being injured in his real estate by an unreasonable use of R's land was one of the proprietary rights of which his general and comprehensive right of property was composed. And that particular right of being uninjured by an unreasonable use of R's land was equally an element of his property, whether such a use were made of R's land by R or by the defendants.

"The right of R to make a reasonable use of his own (although such a use might cause damage to Eaton's farm), like other rights included in R's property, could be transferred to the defendants (the B. C. & M. R. R.) by R himself, or by the legislature exercising the public power of compulsory purchase, commonly called eminent domain. But the right, by an unreasonable use of R's land, to cause a damage to Eaton's farm, not being R's right, could not be transferred from R to the defendants by R, or by eminent domain, or by any other person or power. Eaton's right of not suffering the damage done his farm by the unreasonable use of R's land could be legally taken from him; he could voluntarily divest himself of it; he could be compulsorily deprived of it by the legislature wielding that power of eminent domain which requires compensation.

\* \* \* In *Eaton v. Railroad*, the public (by their agents, the defendants) took from R, and converted to its own use, R's right to make a reasonable use of his own land—that is, a right to make such a use of his land as it would be reasonable for him to make without compensating Eaton or any one else for any damage resulting therefrom. In making such a use of R's land, the defendants would not transcend the authority conferred upon them. But in making an unreasonable use of R's land as against Eaton, and thereby causing Eaton's land to be injured, they took Eaton's property without compensation, and transcended their authority. The power of eminent domain could neither take from R a right (to make such a use of his land) which he never possessed, nor take from Eaton, without compensation, his proprietary right to be unharmed by such a use of R's land. Thus interpreted and applied, the rule,

fairly stated by Sedgwick as the result of the adjudicated cases, is intelligible and sound. It is generally called a rule of consequential damages; and it may safely be called so, if sufficient pains be taken to give such an explanation of its operation and effect as will show how unmeaning and inappropriate the name is.

"If the railroad company, by changing the course of traffic and travel and causing a village to be built on R's land, had reduced the value of Eaton's property in a neighboring village more than the entire worth of his farm, they would not have been liable to him for that damage. They would have been justified, not on the ground that the damage was remote and consequential, in the sense of being a remote consequence, but on the ground that a railroad changing the channels of commerce and causing a rival village to spring up, would be a reasonable use for others to make of their land, an exercise of their rights of property in land, and not a violation of Eaton's right. The idea sometimes conveyed, in such a case, by the supposed doctrine of remote and consequential damage is, that, although the sufferer's legal right is violated, the damage is too remotely consequential, too remote in degree, to be actionable; as if the law would not give redress for the violation of a legal right, when the space between cause and effect exceeds a certain prescribed legal distance. A proprietor's right may be more seriously infringed by a cut through the bank of a river at a great distance from his land, than by a railway built across his hearth-stone. \* \* \* Suppose, in Eaton's case, R—the former owner of the land where the cut was made—had owned not only that, but also all the rest of the strip on which the railroad was built, from Concord to the northern end of the road, or had, by contract, acquired from the owners the right to build and use a railroad upon it; and suppose he could have built and used it without infringing any public right of way on land or water, or any other public right; he could, without legislative authority, have lawfully built and used a railroad there for his exclusive private purposes, or for carrying the passengers and freight now carried by the railroad corporation;



he could have built it over the spot where the cut was made, without violating Eaton's right. Such a use of his own land would have been reasonable; but if he had made such a cut there as the corporation made, without taking the precautions necessary to prevent the natural, apparent, and expected consequence of the river being poured upon Eaton's farm, he would have been liable, because such a cut, causing such an injury, would have been an unreasonable use of his own land. His liability, under such circumstances, was understood to be admitted, and would seem to be too clear to be contested.

"Then modify the supposed case, by inserting the fact that he could not have built the road, on the route on which it was built, without infringing public rights of way on land and water; and suppose that difficulty obviated by an act of the legislature, authorizing him to encroach upon public rights of way to an extent necessary for the building of a railroad, to be used by him in the business of a common carrier; such a modification of public rights would not affect Eaton's private right of not being injured in his property by R pouring Baker's river upon his farm. Modify the supposed case further, by inserting the fact that R obtains a charter, making him a corporation by the name of R; Eaton's right of property would not be affected by the circumstance that the river was poured upon his farm by R, acting, not in his natural capacity, but as an artificial being—invisible, intangible, and existing only in contemplation of law. How, then, could R acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a purchase, voluntary or compulsory. The public, exercising the public power of compulsory purchase, otherwise called eminent domain, whereof compensation is an essential element, could authorize him as a public agent, in his natural or in his artificial capacity, to take as many of Eaton's rights of property as were necessary for a public use. In that way R, as an agent of the public, could obtain Eaton's right of not being injured by an unreasonable use of R's land. That right was properly before the B. C. &

M. Railroad acquired any of R's rights; and it continued to be property afterwards. It was property that the railroad corporation could not acquire from R; and it could not be transferred to them from Eaton by a compulsory purchase without compensation."<sup>17</sup>

<sup>17</sup> We shall not take the space to quote to any extent from the opinions of other courts. The Supreme Court of the United States in a case which is often cited on this question says: "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under

the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177, 1871. Approved and followed in *Arimond v. The Green Bay and Miss. Canal Co.*, 31 Wis. 316, 1872.

"Depriving an owner of property of one of its essential attributes, is depriving him of his property." *People v. Otis*, 90 N. Y. 48, 52. The following are also leading cases on the question: *Conniff v. San Francisco*, 67 Cal. 45; *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; *Same v. Same*, 15 Conn. 312; *Denslow v. Same*, 16 Conn. 98; *Nevins v. Peoria*, 41 Ill. 502; *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 Ind. 433; *Kemper v. Louisville*, 14 Bush. 87; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Old Colony & Fall River R. R. Co. v. County of Plymouth*, 14 Gray, 155; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *O'Brien v. St. Paul*, 25 Minn. 331; *Weaver v. Boom Co.*, 28 Minn. 534; *McKenzie v. Miss. & Rum River Boom Co.*, 29 Minn. 288; *Peters v. Fergus Falls*, 35 Minn. 549; *Thurston v. St. Joseph*, 51 Mo. 510; *Broadwell v. City of Kansas*, 75 Mo. 213; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Selfert v. Brooklyn*, 101 N.

Y. 136; *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N. Y. 10; *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268; *Foster v. Stafford National Bank*, 57 Vt. 128; *Vanderlip v. Grand Rapids*, 79 Mich. 322, 41 N. W. Rep. 677; *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. Rep. 861, 8 Am. R. R. & Corp. Rep. 422; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. Rep. 976.

## CHAPTER IV.

### WHAT CONSTITUTES A TAKING: WATERS.

§ 60. **Streams defined and classified.**—Running streams consist of a well defined channel with sides or banks, in which water habitually flows, though it need not flow continuously.<sup>18</sup> Some streams are small and incapable of navigation for any purpose. All the authorities agree that such streams are wholly private property and that the title of the riparian owner extends to the middle of the stream.<sup>19</sup> In regard to navigable streams, there is much conflict of authority, both as to the title of the riparian owner to the bed of the stream and as to his rights in the stream itself. As to what constitutes navigability is a question which does not fall within the province of this treatise, and for a solution of it the reader is referred to other works.<sup>20</sup> So also as to title to the bed of navigable streams.<sup>21</sup> The decisions of the different States vary upon these questions, and especially upon the latter. For the purposes of this treatise it is necessary to ascertain and define the rights of riparian owners; and, as respects such rights, streams may be divided into three classes: First, private non-navigable streams; second, private navigable streams; third, public navigable streams.<sup>22</sup> The second and third classes are public highways by water, the only difference being that in the second class the title to the bed of the stream is in the riparian proprietors, while in the third class it is in the public. Important distinctions are, by some courts, based upon this circumstance which will be noticed hereafter.

<sup>18</sup> Angell on Watercourses, §§ 1-4; Gould on Waters, § 41.

<sup>19</sup> Angell on Watersc., §§ 10 & 11; Gould on Waters, § 46, et seq.

<sup>20</sup> Angell on Waterc., chap. xlii; Gould on Waters, 19, 41, et seq.; Post, § 76 a.

<sup>21</sup> Angell on Waterc., chap. xlii; Gould on Waters, 19, 41, et seq.; Post, §§ 73, 77-83.

<sup>22</sup> Angell on Waterc., chap. xlii; Gould on Waters, chap. lii; Wood on Nuisances (1st ed.), § 586.

§ 61. **Rights of riparian owners in the flow of the stream.**—It may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the quantity, quality and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land.<sup>23</sup> This right is a part of his property in the land and in many cases constitutes its most valuable element.<sup>24</sup> It necessarily follows, therefore, that

<sup>23</sup> Angell on Watercourses, §§ 90-96; Gould on Waters, § 204; Jessup & M. Paper Co. v. Ford, 6 Del. ch. 52; Ferguson v. Formenich Mfg. Co., 77 Ia. 576, 42 N. W. Rep. 448; Shamleffer v. Peerless Mill Co., 18 Kan. 24; Anderson v. Cinn. So. R. R. Co., 86 Ky. 44, 5 S. W. Rep. 49; Heath v. Williams, 25 Me. 209; Clark v. Cambridge etc. Impv. Co., 45 Neb. 799, 64 N. W. Rep. 239; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. Rep. 841; Parry v. Citizens' Water Works Co., 59 Hun 196, 37 N. Y. St. 715, 14 N. Y. Supp. 471; Gilzinger v. Saugerties Water Co., 66 Hun 173, 21 N. Y. Supp. 121; Clark v. Penn. R. R. Co., 145 Pa. St. 438, 22 Atl. Rep. 989; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780; Silver Spring, etc. Co. v. Wanskuck Co., 13 R. I. 611; Carpenter v. Gold, 88 Va. 551, 14 S. E. Rep. 329; Van Egmond v. Seaforth, 6 Ont. 599; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690; also numerous cases cited in the following sections. Where the waters of a stream gradually sink into the sand and disappear, finding their

way by percolation along the valley of the stream to a lake, they no longer constitute a natural water course, and may be treated as percolating water. Meyer v. Tacoma L. & P. Co., 8 Wash. 144, 35 Pac. Rep. 601. And see post, § 90.

<sup>24</sup> Wadsworth v. Tillotson, 15 Conn. 365, 373; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200; Avery v. Fox, 1 Abb. U. S. 246; Harding v. The Stamford Water Co., 41 Conn. 87; Bottoms v. Brewer, 54 Ala. 288; Stamford Water Co. v. Stanley, 39 Hun, 424; City of Emporia v. Soden, 25 Kan. 588; St. Helena Water Co. v. Forbes, 62 Cal. 182; Lux v. Haggin, 69 Cal. 255; Gould on Waters, §204.

Shamleffer v. Peerless Mill Co., 18 Kan. 24; Moffett v. Brewer, 1 G. Greene 348; Clark v. Cambridge etc. Impv. Co., 45 Neb. 799, 64 N. W. Rep. 239; Weiss v. Oregon etc. Co., 13 Or. 496; Silver Spring etc. Co. v. Wanskuck Co., 13 R. I. 611; Rigney v. Tacoma L. & T. Co., 9 Wash. 576, 38 Pac. Rep. 147. "The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in

any violation of this right in the exercise of the power of eminent domain is a taking of private property for which compensation must be made.<sup>25</sup> Such a violation must occur in one of three ways: (1) By abstracting or diverting water above, (2) by changing or corrupting the current, or (3) by works below which prevent the water flowing off in its accustomed manner. As respects the rights of the riparian owner in the flow of the water, we apprehend it makes no difference whether the stream is public or private, navigable, or not navigable;<sup>26</sup> but we shall recur to the rights of riparian owners upon public and navigable streams hereafter.<sup>27</sup>

§ 61a. What constitutes a reasonable use of a stream by an upper proprietor.—Although this question does not fall strictly within the scope of this work, some reference to authorities on the question may be found convenient.<sup>28</sup>

the interest of the general public, upon full compensation, and in accordance with established law." *Clark v. Cambridge etc. Impv. Co.*, 45 Neb. 799, 64 N. W. Rep. 239.

In some of the arid States the common law rules as to the rights of riparian owners upon streams are held to be inapplicable to the conditions there existing, and therefore not in force, and in several the common law rules are modified by constitutions or statutes. See *Moyer v. Preston* (Wyo.) 44 Pac. Rep. 845; *Clark v. Cambridge etc. Co.*, 45 Neb. 797, 64 N. W. Rep. 239; *Reno Smelting etc. Works v. Stevenson*, 21 Nev. 269, 21 Pac. Rep. 317; *Stowell v. Johnson* (Utah) 26 Pac. Rep. 290; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *Hammond v. Rose*, 11 Col. 524; *Coffin v. Left-Hand Ditch Co.*, 6 Col. 443.

<sup>25</sup> *Lux v. Haggin*, 69 Cal. 255; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127; *Mayor etc. of Baltimore v. Apphold*, 42 Md. 442. And see cases cited in the succeeding sections.

<sup>26</sup> Gould on Waters, § 204.

<sup>27</sup> Post, §§ 73, 77-83.

<sup>28</sup> The following are some of the leading cases in which the question of reasonable use is discussed: *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. Rep. 393; *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. Rep. 600, 35 N. E. Rep. 117; *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. Rep. 72; *Smith v. Agawam Canal Co.*, 2 Allen, 355; *Garwood v. New York Central etc. R. R. Co.*, 83 N. Y. 400; *Drake v. Lady Ensley Coal etc. Co.*, 102 Ala. 501, 14 So. Rep. 749; *Hellbron v. Land & Water Co.*, 80 Cal. 189, 22 Pac. Rep. 62; *Village of Dwight v. Hays*, 150 Ill.

The principal uses to which the water of a stream may be put are for domestic purposes, for watering stock, for irrigation and for manufacturing. The right to take water for domestic purposes and for watering stock is an absolute right, and each proprietor may take what is necessary for these purposes, without regard to the effect upon lower proprietors.<sup>29</sup> But the right to take the water for irrigation or manufacturing purposes is qualified and limited by the existence of like rights in the lower owners, and must be exercised with a due regard to such rights.<sup>30</sup> The rights of a riparian owner have no dependence upon the extent of the watershed which he owns.<sup>31</sup> A riparian owner has no right, as against lower proprietors to take and divert water for the use of non-riparian owners.<sup>32</sup>

§ 61b. What riparian rights in the flow of a stream attach to property held for public use.—Riparian rights in a stream pertain to the land abutting on the stream. They pass with the title to the property and are the same, whether the property is owned by a natural or an artificial person. The rights are not dependent upon the uses made of the property or the purposes for which it is held. The

273, 37 N. E. Rep. 218; *Doorman v. Ames*, 12 Minn. 451; *Creek v. Bozeman Water Works Co.*, 15 Mont. 121, 38 Pac. Rep. 459; *Jones v. Adams*, 19 Nev. 78, 6 Pac. Rep. 442; *Platt v. Root*, 15 Johns, 213; *Palmer v. Mulligan*, 3 Caines Rep. 307; *Standen v. New Rochelle Water Co.*, 91 Hun, 272, 36 N. Y. Supp. 92; *Mumpower v. City of Bristol*, 90 Va. 151, 17 S. E. Rep. 853; *Green Bay etc. Canal Co. v. Kaukanna Water Power Co.*, 90 Wis. 370, 61 N. W. Rep. 1121; *Indianapolis Water Co. v. Am. Straw Board Co.*, 53 Fed. Rep. 970, 57 Fed. Rep. 100; *Gould on Waters*, §§ 205 et seq.

<sup>29</sup> *Garwood v. New York Central etc. R. R. Co.*, 83 N. Y. 400; *Anderson v. Cinn. So. R. R. Co.*, 86

Ky. 44, 5 S. W. Rep. 49; *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. Rep. 393.

<sup>30</sup> Same.

<sup>31</sup> *Standen v. New Rochelle Water Co.*, 91 Hun. 272, 36 N. Y. Supp. 92.

<sup>32</sup> *Heilbron v. Land & Water Co.*, 80 Cal. 189, 22 Pac. Rep. 62; *Anderson v. Cinn. So. R. R. Co.*, 86 Ky. 44, 5 S. W. Rep. 49; *Ulbrecht v. Eufaula Water Co.*, 86 Ala. 537; *Parry v. Citizens' Water Works Co.*, 59 Hun, 196, 37 N. Y. St. 715, 14 N. Y. Supp. 471; *Standen v. New Rochelle Water Co.*, 91 Hun, 272, 36 N. Y. Supp. 92; *Appeal of Haupt*, 125 Pa. St. 211, 17 Atl. Rep. 436; *Ciark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438, 22 Atl. Rep. 989;

fact that the property is held for public use, therefore, would not seem to affect the question of riparian rights.<sup>33</sup> But as the right to use the water pertains to the property, the use must be upon the property for the benefit of the same or its occupants.<sup>34</sup> As a natural person may not take and sell the water to non-riparian owners, so the same may not be done by a city or water company owning land upon a stream.<sup>35</sup> As a natural person may not use the water in his business upon non-riparian property, so a railroad company or other corporation of a public nature is restricted in like manner.<sup>36</sup>

§ 62. **Abstracting or diverting the water of a stream.**—Where the waters of a stream or any part thereof are taken or diverted to supply a city or village with water,<sup>37</sup> or for

Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. Rep. 1007; Saunders v. Bluefield W. W. Co., 58 Fed. Rep. 133.

<sup>33</sup> Saunders v. Bluefield etc. Co., 58 Fed. Rep. 133; Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. Rep. 1007; Appeal of Haupt, 125 Pa. St. 211, 17 Atl. Rep. 436; Rigney v. Tacoma Light & W. Co., 9 Wash. 576, 28 Pac. Rep. 147.

<sup>34</sup> Garwood v. New York Cent. etc. R. R. Co., 83 N. Y. 400.

<sup>35</sup> Montrose Canal Co. v. Loutsenhiser Ditch Co., 23 Col. 223, 48 Pac. Rep. 532; Philadelphia & R. R. Co. v. Pottsville Water Co., 182 Pa. St. 418; post, § 62, note 48; Irving v. Media Borough, 10 Pa. Supr. Ct. 132; Sparks Mfg. Co. v. Newton, 45 Atl. 596 (Ct. of E. & A., N. J.).

<sup>36</sup> Same.

<sup>37</sup> Stein v. Burden, 24 Ala. 130; Stein v. Ashby, 24 Ala. 521; Burden v. Stein, 27 Ala. 104; Stein v. Burden, 29 Ala. 127; Stein v. Ashby, 30 Ala. 363; Harding v.

Stamford Water Co., 41 Conn. 87; St. Helena Water Co. v. Forbes, 62 Cal. 182; City of Emporia v. Soden, 25 Kan. 588; Hamor v. Bar Harbor Water Co., 78 Me. 127; Lund v. New Bedford, 121 Mass. 286; Aetna Mills v. Waltham, 126 Mass. 422; Bailey v. Woburn, 126 Mass. 416; Aetna Mills v. Brookline, 127 Mass. 69; Watuppa Reservoir Co. v. Fall River, 134 Mass. 267; Hall v. Ionia, 38 Mich. 493; Higgins v. Flemington Water Co., 36 N. J. Eq. 538; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Gardner v. Village of Newburgh, 2 Johns. Ch. 161; Smith v. City of Rochester, 92 N. Y. 463; Stamford Water Co. v. Stanley, 39 Hun, 424; Hough v. Doylestown, 4 Brews. Pa. 333; Swindon Water Works Co. v. Wilts & Berks Canal Navigation Co., L. R. 7 E. & I. App. Cas. 697; Ulbright v. Eufaula Water Co., 86 Ala. 587; Moore v. Clear Lake W. W., 68 Cal. 146; Creek v. Bozeman W. W. Co., 15 Mon. 121,



the use of a canal<sup>38</sup> or railroad company,<sup>39</sup> or to improve a

38 Pac. Rep. 439; Van Buren v. Fishkill W. W. Co., 50 Hun, 448, 21 N. Y. St. 448, 3 N. Y. Supp. 336; Parry v. Citizens W. W. Co., 59 Hun, 196, 37 N. Y. St. 715, 14 N. Y. Supp. 471; Gilzinger v. Saugerties W. Co., 66 Hun, 173, 21 N. Y. Supp. 121; Standen v. New Rochelle Water Co., 91 Hun, 272, 36 N. Y. Supp. 92; Appeal of Haupt, 125 Pa. St. 211, 17 Atl. Rep. 436; Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. Rep. 1007; Bowers v. Citizens' Water Co., 162 Pa. St. 9, 29 Atl. Rep. 98; Hogg v. Connellsville Water Co., 168 Pa. St. 456, 31 Atl. Rep. 1010; Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. Rep. 147; Saunders v. Bluefield W. W. etc. Co., 58 Fed. Rep. 133; Board of Water Comrs. v. Perry, 69 Conn. 461; Nemasket Mills v. Taunton, 166 Mass. 540, 44 N. E. Rep. 609; Covert v. Brooklyn, 13 App. Div. N. Y. 188, 42 N. Y. Supp. 310; Lee v. Springfield Water Co., 176 Pa. St. 223, 35 Atl. Rep. 184; Duesler v. Johnstown, 24 App. Div. N. Y. 608; Fisk v. Hartford, 70 Conn. 720; Watson v. New Milford Water Co., 71 Conn. 442, 42 Atl. Rep. 265; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201; Butler Hard Rubber Co. v. Newark, 61 N. J. L. 32, 40 Atl. Rep. 224; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, S. C. Affirmed, 45 Atl. 596; Smith v. Brooklyn, 160 N. Y. 357; Gallagher v. Kingston Water Co., 25 N. Y. App. Div. 82; Irving v. Media Borough, 10 Pa. Supr. Ct. 132. A temporary diversion by a water company

for the purpose of repairing its dam was held not actionable. Mott v. Consumers Water Co., 188 Pa. St. 521, 41 Atl. Rep. 611.

<sup>38</sup> Denslow v. New Haven & Northampton Canal Co., 16 Conn. 98; Heilman v. Union Canal Co., 50 Pa. St. 268; Walker v. Board of Public Works, 16 Ohio, 540; Hellbron v. Canal Co., 75 Cal. 426.

<sup>39</sup> It has been held that a railroad company, being a riparian proprietor, either by virtue of its right of way crossing a stream or otherwise, may take therefrom a reasonable amount of water for the purpose of supplying its locomotives or for other use. Elliot v. Fitchburg R. R. Co., 10 Cush. 191; Pennsylvania R. R. Co. v. Miller, 112 Pa. St. 34; Earl of Sandwich v. Great Northern Ry. Co., L. R. 10 Ch. Div. 707; Graham v. Northern R. R. Co., 10 Grant Ch. 259. But this right is denied in Anderson v. Cinn. So. R. R. Co., 86 Ky. 44, 5 S. W. Rep. 49, and a railroad company was held liable to the lower proprietor for withdrawing water for railroad uses. To the same effect is Garwood v. New York Central etc. R. R. Co., 83 N. Y. 400, S. C. 17 Hun, 356. This case also denies the right of a railroad company to withdraw water for its locomotives to the injury of a lower proprietor. After stating that a riparian proprietor has an absolute right to withdraw sufficient water for domestic purposes and for cattle and a qualified right to use the water for irrigation and manu-

highway by land,<sup>40</sup> or to make a new channel either for the improvement of navigation,<sup>41</sup> or for the protection of a public road,<sup>42</sup> or for any other public use, compensation must be made to the inferior proprietors on the banks of the

facturing, provided the use is upon the land to which the right is incident, the court says: "Now in the case before us the defendant has done something more; it has not been content with exercising this privilege; it has diverted a considerable portion of the stream not for any use upon the land past which it flows, but for the transaction of its business in other places, and for purposes in no respect pertaining to the land itself. \* \* \* So far as the plaintiff is concerned, it has carried away from his premises the water, as effectually as if it had been turned into another channel and discharged at Albany or Buffalo; and from this, as the jury has found, he has sustained damages." In *Clark v. Penn. R. R. Co.*, 145 Pa. St. 433, 22 Atl. Rep. 989, it is held that, no matter what the necessities of the defendant's business, it had no right to take water from a stream for its locomotives, without compensation to those damaged thereby. And this would seem to be the correct rule. See § 61 a.

Where a railroad company, in constructing its road totally diverted a stream from a lower proprietor, the latter was held entitled to a mandatory injunction for its restoration. *Atchison, T. & S. F. R. R. Co. v. Long*, 46 Kan. 701, 27 Pac. Rep. 182.

But an owner may lose his right to equitable relief by keeping silent while he sees the company expend large sums in diverting a small stream. *Slocumb v. C. B. & Q. R. R. Co.*, 57 Ia. 675.

<sup>40</sup> *McCord v. High*, 24 Ia. 336.

<sup>41</sup> *Avery v. Fox*, 1 Abb. U. S. 246, 253. In this case the court says: "To divert a stream from its natural channel into an artificial one, for the purpose of affording improved navigation and benefiting commerce, may be a work of great public concernment and advantage, but if thereby a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and, unless just compensation is made, is against both the principles of the common law and the provisions of the constitution of the United States, and courts have no alternative but to so administer the law as to secure and protect such rights in a proper case." The improvement in this case was being made by the United States and so the Federal Constitution applied to the case.

<sup>42</sup> *Smith v. Gould*, 59 Wis. 631; *S. C.* 61 Wis. 31; *State ex rel. Smith, v. Board of Supervisors*, 66 Wis. 199.

stream who are injured thereby.<sup>43</sup> The only dissenting case which has come to our notice is that of the *Commissioners of Homochitto River v. Withers*, in which the Supreme Court of Mississippi held that it was not a taking, to divert a stream of water from the plaintiff's property into a new channel for the purpose of improving navigation.<sup>44</sup> This decision is so palpably wrong that we do not think it requires discussion. Where a railroad company divert a stream into a new channel for a short distance, it is bound to restore it unimpaired to its natural channel, and where in such case the stream escaped from the new channel by percolation the company was held liable.<sup>45</sup>

The manner in which the diversion is accomplished is immaterial, whether by an artificial channel, by pumping, by

<sup>43</sup> See also the following cases, in most of which, however, the diversion was not for public use. *Heilbron v. Land & Water Co.*, 80 Cal. 189, 22 Pac. Rep. 62; *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762; *Platt v. Root*, 15 Johns, 213; *Palmer v. Mulligan*, 3 Caines Rep. 307; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. Rep. 841; *Hogg v. Connellsville Water Co.*, 168 Pa. St. 456, 31 Atl. Rep. 1010; *Carpenter v. Gold*, 88 Va. 551, 14 S. E. Rep. 329; *Mum-power v. City of Bristol*, 90 Va. 151, 17 S. E. Rep. 853; *Green Bay etc. Canal Co. v. Kaukanna W. P. Co.*, 90 Wis. 370, 61 N. W. Rep. 1121.

<sup>44</sup> 29 Miss. 21, 32. The court says: "It appears to us that it (the constitution) applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession

and transmitted to another, as houses, lands, and chattels. But it is not easy to understand how a man can be said to have a property in water, light, or air of so fixed and positive a character as to deprive the sovereign power of the right to control it for the public good and general convenience." In *South Carolina v. Georgia*, 93 U. S. 4, it was held that congress might close one of two navigable channels of a river. No question of private right was involved in this case and, besides, causing the water of a stream to flow in one of two natural channels is quite different from diverting it wholly into an artificial channel. See also *Black Riv. Imp. Co. v. La Crosse Booming & Tram. Co.*, 54 Wis. 659; *Wisconsin v. Duluth*, 96 U. S. 379.

<sup>45</sup> *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214. See also *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. Rep. 393.

percolation into a well or gallery, or by other means. The injury consists in taking the water. Under a general authority to take water for the purpose of supplying its inhabitants with water for domestic use, for extinguishing fires and for manufacturing, a city purchased land on a stream bordering a mill pond and dug a well about seventy-five feet from the water's edge, from which it pumped a supply. The water came to the well by percolation from the pond. The city also extended a pipe directly into the pond, to be used only in case of fire. The owner of the pond and of the mill which the pond supplied brought suit for the damages. It was held that he was entitled to recover, that the city had no more right to draw the water from the pond indirectly, by percolation, than directly, by a pipe or other means, and that the distance of the well from the pond was immaterial, provided its supply came from the pond.<sup>46</sup> Similar decisions have been made in Massachusetts and other States.<sup>47</sup> The fact that the city is the owner in fee of land on the stream where such works are constructed does not alter the case.<sup>48</sup> The right of a riparian owner to take sufficient water for domestic use does not apply to a city. It is not an individual and has no natural wants.<sup>49</sup> Where a city under a special act has

<sup>46</sup> *City of Emporia v. Soden*, 25 Kan. 588.

<sup>47</sup> *Bailey v. Woburn*, 126 Mass. 416; *Aetna Mills v. Waltham*, 126 Mass. 422; *Aetna Mills v. Brookline*, 127 Mass. 69; *Cowdrey v. Woburn*, 136 Mass. 409; *Hollingsworth & V. Co. v. Foxborough Water Supply Dist.*, 165 Mass. 186, 42 N. E. Rep. 574; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, 24 N. E. Rep. 179; *Covert v. Cranford*, 141 N. Y. 521, 36 N. E. Rep. 597; *Smith v. Brooklyn*, 18 App. Div. N. Y. 340; *Smith v. Brooklyn*, 160 N. Y. 357; *affirming S. C. 32 App. Div. N. Y. 257*; *Irving v. Media Borough*, 10 Pa. Supr. Ct. 132.

<sup>48</sup> Same; also *Stein v. Burden*, 24 Ala. 130; and as respects other corporations withdrawing water for a public use as riparian proprietors, see *Garwood v. N. Y. Cent. & H. R. R. Co.*, 83 N. Y. 400; *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34; *Swindon Water Works Co. v. Welts & Berks Canal Co.*, L. R. 7 E. & I. App. Cas. 697; *Earl of Sandwich v. Great Northern Ry. Co.*, L. R. 10 Ch. Div. 707.

<sup>49</sup> *City of Emporia v. Soden*, 25 Kan. 588, 607. The court says: "The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner.

voted to take a million gallons a day from a river, and has constructed a filtering gallery on land adjacent to the river into which water comes by percolation both from the river and from other sources, a riparian owner on the stream is entitled to have his damages assessed on the basis of the taking of the maximum amount daily.<sup>50</sup>

The riparian owners upon a stream which flows through or from a pond or lake, are entitled to compensation for water taken from the lake.<sup>51</sup> Where a canal company used a stream of water for a period of years, in pursuance of a contract, and continued the use after the contract expired, it was held to be an appropriation under the eminent domain powers conferred upon the company and that the owner at the time of the appropriation was entitled to compensation.<sup>52</sup> But, where a canal company construct an artificial feeder over an individual's land, he acquires no right to the use of the water as against the company, and the latter may divert it at pleasure.<sup>53</sup> Where a canal company has the right to take water from a stream for navigation purposes only, it cannot take a surplus for the purpose of leasing it to mill owners.<sup>54</sup>

§ 63. Increasing the quantity of water.—Not only is it a violation of the right of a riparian owner to obstruct or

But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes; it is not an individual; it has no natural wants; it is not taking for its own use, but to supply a multitude of individuals; it takes to sell."

<sup>50</sup> *Aetna Mills v. Waltham*, 126 Mass. 422.

<sup>51</sup> *Bailey v. Town of Woburn*, 126 Mass. 416; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Smith v. City of Rochester*, 92 N. Y. 463; S. C. 38 Hun, 612; *Stock v. Township of Jefferson*, 114 Mich. 357, 72 N. W. Rep. 132;

*Neal v. Rochester*, 156 N. Y. 213; affirming S. C. 38 Hun, 614.

<sup>52</sup> *Heilman v. Union Canal Co.*, 50 Pa. St. 268.

<sup>53</sup> *Cooper v. Williams*, 4 Ohio, 253; *Erkenbrecher v. Cincinnati*, 2 Cinn. Sup. Ct. 412; *Burbank v. Fay*, 65 N. Y. 57. But where a natural watercourse was changed into a canal and used as such for twenty years, it was held the riparian proprietors had the same rights as though it had continued a natural watercourse. *Burk v. Simonson*, 104 Ind. 173.

<sup>54</sup> *Adams v. Slater*, 8 Ills. App. 72.

divert the water of a stream before it reaches his land, but it is equally a violation of his rights to increase the quantity of water flowing past his land by artificial means not connected with the reasonable use of the land above.<sup>55</sup> Thus plaintiff owned land on both sides of Roland's Run, which was a natural stream. The City of Baltimore proposed to introduce into the stream, above plaintiff, an artificial supply of ten million gallons a day, for the purpose of increasing the supply in a reservoir situated in the run below plaintiff's land, from which the city was supplied. It appeared that this increase would cause the stream to overflow some of plaintiff's land and saturate and injure other parts. The court held that the plaintiff was entitled to have the stream "continue to flow through his land in its usual quantity, at its natural place and at its usual height," and that the city should be enjoined from doing the damage until it had acquired the right by condemnation.<sup>56</sup> No action lies for raising the water in a stream by drains and sewers which conduct surface water only, and which only increase the flow by draining the watershed more quickly.<sup>57</sup> Water turned into a running stream by a riparian proprietor, becomes, after leaving his land, identified with the natural stream as to any benefit to the lower proprietors, and one

<sup>55</sup> Wood on Nuisances, § 365.

<sup>56</sup> *Mayor of Baltimore v. Apphold*, 42 Md. 442. To same effect: *Rudel v. County of Los Angeles*, 118 Cal. 281; *McKee v. Del. & H. Canal Co.*, 125 N. Y. 353, 26 N. E. Rep. 305; *S. C. 52 Hun*, 52, 22 N. Y. St. 222, 4 N. Y. Supp. 753; *Pfeiffer v. Brown*, 165 Pa. St. 267, 30 Atl. Rep. 844; *Owens v. Lancaster*, 182 Pa. St. 257; *Malott v. Mersea*, 9 Ontario 611; and see *Grant v. Kugler*, 81 Ga. 637; *Kay v. Kirk*, 76 Md. 41, 24 Atl. Rep. 326; *Barrett v. Mt. Greenwood Cem. Ass.*, 57 Ill. App. 401; *Plattsmouth Water Co. v. Smith*, 57 Neb. 579, 73 N. W.

Rep. 275. In *Brown v. Atlanta*, 66 Ga. 71, the defendant city had a reservoir above plaintiff and let off the water in a way to damage plaintiff by the increased flow. It was held that the city had a right to do so, provided it exercised that care which a prudent person would do who had lands below, and provided it did no more harm than nature's floods would do had there been no reservoir and provided the flow would not, in the absence of other causes, more than fill the bed of the stream.

<sup>57</sup> *Bainard v. City of Newton*, 154 Mass. 255, 27 N. E. Rep. 995.

such lower proprietor cannot abstract an amount equal to that artificially added, to the injury of another.<sup>58</sup>

§ 64. *Interfering with the regularity of the current.*—The upper proprietor may always make a reasonable use of the water as it passes over his land, although such use may to a certain extent change the natural current of the stream or affect its volume or quality. What constitutes a reasonable use in any given case is a question of fact for the jury.<sup>59</sup> Beyond this neither individuals nor the public can go without compensation to the inferior proprietor who suffers damage. Any interference with the regularity of the current for public use, so as to make the flow fitful, uncertain and intermittent, is a violation of the common law right to have the stream flow as it is wont by nature, and a recovery may be had for any damages so occasioned.<sup>60</sup> Where a booming company erect dams across a stream and let off the water from time to time in floods for the purpose of floating logs, and in the intervals retain the water for such purpose, a lower proprietor whose mill is interfered with or whose lands are flooded may recover compensation.<sup>61</sup> But a boom company was held not liable

<sup>58</sup> *Druley v. Adams*, 102 Ill. 177.

<sup>59</sup> *Thompson v. The Androscoggin River Improvement Co.*, 54 N. H. 545; *Phillips v. Sherman*, 64 Me. 171.

<sup>60</sup> *Boston Belting Co. v. City of Boston*, 152 Mass. 307, 25 N. E. Rep. 613; *McKee v. Del. & H. Canal Co.*, 125 N. Y. 353, 26 N. E. Rep. 305; *Ordway v. Village of Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835; *Lakeside Paper Co. v. State*, 15 App. Div. N. Y. 169; *Blizzard v. Danville*, 175 Pa. St. 479, 34 Atl. Rep. 846; *Carlson v. St. Louis etc. Co.*, 73 Minn. 123, 75 N. W. Rep. 1044; Compare *Brown v. Atlanta*, 66 Ga. 71. See ante § 61a.

<sup>61</sup> *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Koopman v. Blodgett*, 70 Mich. 610, 38 N. W. Rep. 649; *Folsom v. The Apple River Log Driving Co.*, 41 Wis. 602; *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545; *Phillips v. Sherman*, 64 Me. 171; *Carroll v. Atlanta*, 74 Ga. 386; *Brown v. Atlanta*, 66 Ga. 71; *Hackstack v. Keshena Improvement Co.*, 66 Wis. 439. In the last case the plaintiff's property was situated twenty miles below the improvements. It was flooded by water detained and let off in large volumes for the purpose of floating logs. In *Massachusetts*

for damages caused by an unusual accumulation of logs and an unusual rise of water.<sup>62</sup> And a recent case in Wisconsin holds that a river improvement company, authorized to construct dams and other works, to aid in the floating of logs, was not liable to a mill owner below for damages resulting from alternately retaining and letting off the water.<sup>63</sup>

§ 65. *Pollution of the water.*—The general right to the flow of a stream in its natural purity is fully established by the decisions.<sup>64</sup> The upper proprietor may, of course, make a reasonable use of the stream or of his land, though the stream is to some extent polluted thereby.<sup>65</sup> Should it ever become necessary to befoul the waters of a stream for public use, those who suffered damages thereby would unquestionably be entitled to compensation. Such an emergency might arise in disposing of the sewage of a large city, and perhaps in other ways; but no case appears to have arisen in which the pollution of a stream has been accomplished for a public purpose and in the exercise of

it is held that under the Mill act a mill owner is not liable for any injury done to intervening land by letting down water from his reservoir dam for the use of his mill, for which he would not be liable at common law. *Drake v. Hamilton Woolen Co.*, 99 Mass. 574.

<sup>62</sup> *Lawler v. Baring Boom Co.*, 56 Me. 443.

<sup>63</sup> *Falls Mfg. Co. v. Oconto Riv. Imp. Co.*, 87 Wis. 134, 58 N. W. Rep. 257. As to damages by works for the improvement of navigation see Post, § 71.

<sup>64</sup> *Gladfelter v. Walker*, 40 Md. 1; *Richmond Manufacturing Co. v. Atlantic DeLaine Co.*, 10 R. I. 106; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Drake v. Lady Ensley Coal etc. Co.*, 102 Ala. 501, 14 So. Rep. 749;

*Jessup & Moore Paper Co. v. Ford*, 6 Del. Ch. 52; *Randolph v. Pennsylvania S. V. R. R. Co.*, 186 Pa. St. 541; *Ferguson v. Formenich Mfg. Co.*, 77 Ia. 576, 42 N. W. Rep. 448; *Silver Spring etc. Co. v. Waunskuck Co.*, 13 R. I. 611; *Van Egmond v. Seaforth*, 6 Ontario 599; *Attorney General v. Lunatic Asylum*, 4 L. R. Ch. App. 146; *Angell on Waterc.*, § 136; *Wood on Nuisances*, § 597; ante § 61.

<sup>65</sup> *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. Rep. 72. The question of reasonable use, as respects pollution, is much considered in *Indianapolis Water Co. v. Am Strawboard Co.*, 53 Fed. Rep. 970, 57 Fed. Rep. 1000 and *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. Rep. 600.



the eminent domain power.<sup>66</sup> It has been held that a company to supply a village with water could not take the water of a stream and return to it an equal amount of inferior quality to the damage of a lower proprietor;<sup>67</sup> also that a city could not pollute a stream with sewage, however great the necessity of making such use.<sup>68</sup> In Massachusetts<sup>69</sup> it has been held that it is a reasonable use of a stream running through a city, to empty into it the public sewers of the town, and that for such pollution as arises therefrom the lower proprietor has no remedy. This seems to us a wrong conclusion. Undoubtedly the lower proprietor must endure without remedy such impurities as find their way into a stream from the natural wash and drainage of a city situated on its banks. Drains and sewers may be constructed for the purpose of facilitating the drainage into the stream of the water which falls upon the surface or percolates beneath.<sup>70</sup> This is no more than a reasonable use of the stream. But it is a different thing to conduct directly into the stream, by means of sewers and artificial supplies of water, the waste and filth which come from a dense population. There is no principle upon which this can be justified. A city is not a riparian proprietor simply because a stream runs through or past its limits.<sup>71</sup> Those who own the banks of the stream are the riparian proprietors. And even if the city could be regarded as a riparian owner, either because the stream was within its corporate limits or because its streets or public grounds intersected or bounded on it, there is no riparian right to cast filth directly into the stream. A single proprietor upon a very small stream would not be allowed to place his privy over the stream and turn directly into it the refuse from his kitchen and stable. No more can a hundred proprietors on a larger

<sup>66</sup> Long v. Emporia, 59 Kan. 46.

<sup>67</sup> Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366.

<sup>68</sup> Attorney General v. Leeds, 5 L. R. Ch. App. 583, 589.

<sup>69</sup> Merrifield v. Worcester, 110 Mass, 216; compare Middlesex Co. v. City of Lowell, 149 Mass.

509, 21 N. E. Rep. 872. So in Indiana, Valparaiso v. Hagen, 153 Ind. 337; Richmond v. Test, 18 Ind. App. 482.

<sup>70</sup> Bainard v. City of Newton, 154 Mass. 255, 27 N. E. Rep. 995.

<sup>71</sup> Vale Mills v. Nashua, 63 N. H. 42.

stream or the corporate authorities of a city through which it runs.<sup>72</sup> But we see no reason why this could not be done if authorized by law and compensation was made for taking the right to pure water. This has recently been done in some of the States.<sup>73</sup> Under authority to take the waters

<sup>72</sup> We have allowed this section to stand as it appears in the first edition. Since then numerous decisions have been rendered in support of the text. If the following cases cities were restrained from polluting streams with sewage: *Butler v. Thomasville*, 74 Ga. 570; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 218; *Middlesex Co. v. City of Lowell*, 149 Mass. 509, 21 N. E. Rep. 872; *Morgan v. Bingham*, 32 Hun, 602; *Schrivver v. Village of Johnstown*, 71 Hun, 232, 24 N. Y. Supp. 1083; *Goldsmid v. Tunbridge Wells Impr. Comrs.*, L. R. 1 Ch. App. 349, affirming S. C. L. R. 1 Eq. 161; *Van Egmond v. Seaforth*, 6 Ontario, 599; *People v. San Luis Obispo*, 116 Cal. 617, 48 Pac. Rep. 723; *Nolan v. New Britain*, 69 Conn. 668; *Moody v. Saratoga Springs*, 17 App. Div. N. Y. 207. And see *Robb v. La Grange*, 158 Ill. 1, 42 N. E. Rep. 77; *Barrett v. Mt. Greenwood Cem. Ass.* 159 Ill. 385, 42 N. E. Rep. 891; *Lefrois v. Monroe County*, 24 App. Div. 421; *Abraham v. Fremont*, 54 Neb. 391, 74 N. W. Rep. 834; *Peterson v. Santa Rosa*, 119 Cal. 387. In the following, suits for damages were sustained for the same cause: *City of Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. Rep. 878, affirming S. C. 48 Ill. App. 247; *Loughran v. Des Moines*, 72 Ia. 382; *Edmondson v. City of Mober-*

*ley*, 98 Mo. 523, 11 S. W. Rep. 990; *Vale Mills v. Nashua*, 63 N. H. 42; *Hooker v. Rochester*, 37 Hun, 181; *Demby v. City of Kingston*, 60 Hun, 294, 38 N. Y. St. 42, 14 N. Y. Supp. 601; S. C. affirmed without opinion 133 N. Y. 538; *Good v. City of Altoona*, 162 Pa. St. 493, 29 Atl. Rep. 741; *Owens v. Lancaster*, 182 Pa. St. 257; *Bloomington v. Costello*, 65 Ill. App. 407; *Schoen v. Kansas City*, 65 Mo. App. 134; *McBride v. Akron*, 11 Ohio C. C. 610; *Long v. Emporia*, 59 Kan. 46; *Paris v. Allred*, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62. See also *Lind v. City of San Luis Obispo*, 109 Cal. 340, 42 Pac. Rep. 437; *Robb v. La Grange*, 57 Ill. App. 386; *Pfeiffer v. Brown*, 165 Pa. St. 267, 30 Atl. Rep. 844; *Gray v. Dundas*, 11 Ontario, 317; *City of Hutchinson v. Delano*, 46 Kan. 345, 26 Pac. Rep. 740. A mill owner may be enjoined from depositing sawdust in a stream to the damage of a lower proprietor. *Waterman v. Buck*, 58 Vt. 519. See also *Indianapolis Water Co. v. Am. Strawboard Co.*, 53 Fed. Rep. 970, 57 Fed. Rep. 1000.

<sup>73</sup> *Washburn & M. Mfg. Co. v. City of Worcester*, 153 Mass. 494, 27 N. E. Rep. 664; *Worcester Gas Light Co. v. County Comrs.*, 138 Mass. 289; *Kellogg v. City of New Britain*, 62 Conn. 232, 24 Atl. Rep. 996; *Joplin Con. Min.*

of a stream for sewer purposes, a section was taken, the sewer constructed and the waters of the stream conducted through it, but the same were restored to their natural channel before reaching plaintiff's land. It was held a taking of the waters as to plaintiff and that his right to compensation accrued at the time of such appropriation.<sup>74</sup> But a general authority to construct sewers is not to be so exercised as to permit the creation of a nuisance.<sup>75</sup> Where a river is public, that is where the title to the bed is in the State, it has been held that the remedy for pollution must be sought through the attorney-general.<sup>76</sup> One who has been accustomed to foul a stream by using the water for manufacturing purposes, but has acquired no right to do so by grant or prescription, cannot recover damages when compelled to relinquish such use of the water by reason of the stream being taken at a point below his mill under the power of eminent domain to supply a city with water.<sup>77</sup> But if the mill-owner has acquired such right by prescription or otherwise, then the right must be condemned.

§ 66. Changing the current by works in, across or near the channel to the injury of those below.—Works of public utility must be so constructed as not to interfere with the accustomed flow of the stream, otherwise there is a right to recover for any consequent damage to private property. <sup>78</sup> Authority to bridge or cross a stream

Co. v. City of Joplin, 124 Mo. 129, 27 S. W. Rep. 406.

<sup>74</sup> Worcester Gas Light Co. v. County Comrs., 138 Mass. 289.

<sup>75</sup> Edmondson v. City of Mo. berley, 98 Mo. 523, 11 S. W. Rep. 990; Moody v. Saratoga Springs, 17 App. Div. N. Y. 207.

<sup>76</sup> Newark Aqueduct Board v. City of Passaic, 45 N. J. Eq. 393, 18 Atl. Rep. 106. See also King v. Bristol Dock Co., 12 East, 429. As to the protection of a public water supply from pollution see

Kelley v. New York, 6 Misc. 516, 27 N. Y. Supp. 164; Commonwealth v. Russell, 172 Pa. St. 506, 33 Atl. Rep. 709.

<sup>77</sup> Baltimore v. Warren Manufacturing Co., 59 Md. 96; Dwight Printing Co. v. Boston, 122 Mass. 583.

<sup>78</sup> Rowe v. Granite Bridge Corporation, 21 Pick. 344; Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200; Robinson v. N. Y. & E. R. R. Co., 27 Barb. 512; Chapman v. City of Rochester,

does not imply authority to interfere with its current.<sup>79</sup> Where a railroad company, in carrying its road across a stream, erected a bridge and embankment in such a way as to change and increase the current of the stream in times of high water, thereby causing damage to the lands of a proprietor some distance below, none of whose land was taken, it was held he could recover compensation for the loss.<sup>80</sup> And, generally, if a railroad company in bridging a stream changes in any way the natural current of the stream to the damage of private property, there is a right to compensation.<sup>81</sup> The same rule applies to a bridge built by a town or city as part of a highway.<sup>82</sup> It is held that

110 N. Y. 273, 18 N. E. Rep. 88; Gulf etc. R. R. Co. v. Locker, 78 Tex. 279, 14 S. W. Rep. 611.

<sup>79</sup> Rowe v. Granite Bridge Corporation, 21 Pick. 344; Robinson v. N. Y. & E. R. R. Co., 27 Barb. 512.

<sup>80</sup> Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433, 436. "A proper construction of the word taken," says the court, "makes it synonymous with seized, injured, destroyed, deprived of. It is, therefore, evident that the legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." But where the road crossed on the land of the plaintiff it was held that it must be presumed that he had been compensated for all such damages as would result from constructing the bridge in a reasonable and proper manner with a view both to the safety of passengers and the protection of the property-holder, and that he could only recover for damages resulting from im-

proper construction as thus explained. See also *Terre Haute & Indianapolis R. R. Co. v. McKinley*, 33 Ind. 274.

<sup>81</sup> Robinson v. N. Y. & E. R. R. Co., 27 Barb. 512; Dickson v. Chicago, Rock Island and P. R. R. Co., 71 Mo. 575; Delaware, etc., Canal Co. v. Lee, 22 N. J. L. 243; Estabrooks v. Peterborough & Shirley R. R. Co., 12 Cush. 224; Chicago, Rock Island & P. Ry. Co. v. Moffitt, 75 Ill. 524; Union Pacific Ry. Co. v. Dyche, 31 Kan. 120; Rock Island etc. R. R. Co. v. Krapp, 74 Ill. App. 158; Lake Erie etc. R. R. Co. v. Purcell, 75 Ill. App. 573; Kansas City etc. R. R. Co. v. Lackey, 72 Miss. 881, 16 So. Rep. 909; Mobile & O. R. R. Co. v. Bynum (Miss.), 15 So. Rep. 795; St. Louis, etc. R. R. Co. v. Craig, 10 Tex. Civ. App. 238, 31 S. W. Rep. 207. Contra: Norris v. Vermont Central R. R. Co., 28 Vt. 99; Henry v. Same, 30 Vt. 638.

<sup>82</sup> Perry v. Worcester, 6 Gray, 544; Stone v. Augusta, 46 Me. 127.

one over whose land such crossing is made is entitled to receive compensation for all such damages as will result from constructing the bridge or other crossing in a reasonable and proper manner.<sup>83</sup> If no part of one's land is taken, he may always recover for damages occasioned by such interference with the current of a stream, either by an assessment under the statute,<sup>84</sup> or by a common law action.<sup>85</sup> Damages which result from negligent or improper construction may always be recovered, whether there has been an assessment of damages or not.<sup>86</sup> In bridging a stream, by legislative authority, a railroad company is only required to exercise reasonable diligence and foresight to avoid damages by reason of extraordinary floods and ice gorges.<sup>87</sup> Such floods are deemed an act of God, for the consequences of which no one is liable.<sup>88</sup> A railroad company, in crossing a small stream, diverted it into a ditch along its track for about 300 feet and then discharged it through a culvert upon the plaintiff's land, whence it sought the regular channel. In times of flood, stones and gravel were deposited upon the plaintiff's land. It was held that this amounted

<sup>83</sup> *Terre Haute & Indianapolis R. R. Co. v. McKinley*, 33 Ind. 274; *Mississippi Central R. R. Co. v. Mason*, 51 Miss. 234; *Baltimore & Potomac R. R. Co. v. Magruder*, 34 Md. 79. As to the correctness of this position, see Post, chap. xxiv. Where an owner grants a right of way over his land to a railroad, with the right to change watercourses, this only authorizes changes on his own land, and he may recover damages caused to his land by a change made by the company on the land of another. *St. Louis etc. R. R. Co. v. Harris*, 47 Ark. 340. To the same effect, *Eaton's Case*, 54 N. H. 502.

<sup>84</sup> *Estabrooks v. Peterborough & Shirley R. R. Co.*, 12 Cush. 224.

<sup>85</sup> *Delaware & Raritan Canal*

*Co. v. Lee*, 22 N. J. L. 243; *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 Ind. 433.

<sup>86</sup> *Spencer v. Hartford, Providence & T. R. R. Co.*, 10 R. I. 14; *Fowle v. N. H. & N. R. R. Co.*, 112 Mass. 334; *Kansas City etc. R. R. Co. v. Lackey*, 72 Miss. 881, 16 So. Rep. 909; *Brink v. Kansas City etc. R. R. Co.*, 17 Mo. App. 177; *I. & G. N. Ry. Co. v. Klaus*, 64 Tex. 293; Post, §§ 651, 574.

<sup>87</sup> *Bellinger v. New York Central R. R. Co.*, 23 N. Y. 42; *Omaha and R. V. R. R. Co. v. Brown* 14 Neb. 170; *S. C. 16 Neb. 161*; *Gulf C. & S. F. R. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. Rep. 535; and see Post, § 67 note 7.

<sup>88</sup> *Doorman v. Ames*, 12 Minn. 451.

to a taking of the plaintiff's property, which could not be accomplished without a condemnation, and that, in the absence of such condemnation, a bill would lie to compel a restoration of the stream to its original channel.<sup>89</sup> Changing the channel or direction of the current, so that the stream is cast upon the lower proprietor in a different place, or so that the current strikes his land from a different direction, to his injury, is a taking or actionable injury.<sup>90</sup> The channel of the American River, a tributary of the Sacramento, was changed so as to enter the latter river opposite the plaintiff's premises. During a high flood, the force of the current was such as to wash away the plaintiff's land and buildings, causing damage to the amount of \$28,000. It was held by the Supreme Court of California that the damage was not a taking and that there was no liability on the part of the commissioners engaged in the work or of the city for whose benefit it was done.<sup>91</sup>

66a. Embankment on one side of stream causing an increase of flood water upon the opposite side.—Where a railroad company builds an embankment on one side of a stream, which causes an increased flow of flood waters upon the lands situated along the opposite bank, to their damage, the company will be liable.<sup>92</sup> Some cases, how-

<sup>89</sup> *Wright v. Syracuse etc. R. R. Co.*, 49 Hun, 445, 23 N. Y. St. 78, 3 N. Y. Supp. 480; S. C. affirmed without opinion, 124 N. Y. 668. To the same effect: *East St. Louis etc. R. R. Co. v. Elsen-trant*, 134 Ill. 96, 24 N. E. Rep. 760; *George v. Wabash Western R. R. Co.*, 40 Mo. App. 433; *Koch v. Del. L. & W. R. R. Co.*, 54 N. J. L. 401, 24 Atl. Rep. 442; *Fleming v. Wilmington & W. R. R. Co.*, 115 N. C. 676, 20 S. E. Rep. 714. Compare *City of Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. Rep. 706.

<sup>90</sup> Same; also *Grant v. Kugler*, 81 Ga. 637; *Kay v. Kirk*, 76 Md.

41, 24 Atl. Rep. 326; *Parker v. Atkinson*, 58 Kan. 29; and see *Stone v. State*, 138 N. Y. 124, 33 N. E. Rep. 733; *Rogers v. Coal River B. & D. Co.*, 39 W. Va. 272, 19 S. E. Rep. 401. Contra: *War-fel v. Cochran*, 34 Pa. St. 381.

<sup>91</sup> *Green v. Swift*, 47 Cal. 536; *Hoagland v. Sacramento*, 52 Cal. 142; see also a similar case in Ohio: *Railroad Co. v. Carr*, 38 Ohio St. 448; see § 91.

<sup>92</sup> *O'Connell v. East Tenn. V. & G. R. R. Co.*, 87 Ga. 246, 13 S. E. Rep. 489, which contains a valuable review of cases; *Barden v. City of Portage*, 79 Wis. 126, 48 N. W. Rep. 210; *Cairo, etc. R. R.*

ever, hold the contrary.<sup>93</sup> A city was held not liable because a levee which it had built caused the flood water to accumulate to a greater depth upon the plaintiff's lots which were situated between the levee and the river.<sup>94</sup>

§ 67. Works which set back the water and cause a flooding of the lands above.—The right to have a stream flow as it is wont by nature,<sup>95</sup> includes the right to have the water flow off from one's premises as it is accustomed to do, and this right is property.<sup>96</sup> Where works are constructed below the lands of a proprietor, such as a bridge, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made.<sup>97</sup> Works which obstruct the flow of a stream are

Co. v. Brevoort, 62 Fed. Rep. 129; Hartshorn v. Chaddock, 135 N. Y. 116, 31 N. E. Rep. 997; Lawrence v. Great Northern R. R. Co., 16 Q. B. 643.

<sup>93</sup> Kansas City etc. R. R. Co. v. Smith, 72 Miss. 677, 17 So. Rep. 73; Kansas City etc. R. R. Co. v. Lackey, 72 Miss. 881, 16 So. Rep. 909; Moyer v. New York Cent. etc. R. R. Co., 88 N. Y. 351. In Tyron v. Baltimore County, 28 Md. 510, it was held there was no liability for similar injuries caused by a wall erected by county authorities to protect a public road. And see De Baker v. Southern California R. R. Co., 106 Cal. 257, 39 Pac. Rep. 610. As to whether flood waters, overflowing the banks of a stream, are to be regarded as surface water or as a part of the stream, see Post § 88a.

<sup>94</sup> Hoard v. Des Moines, 62 Ia. 326.

<sup>95</sup> Ante, § 61.

<sup>96</sup> Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

<sup>97</sup> The cases which support this proposition are very numerous. The leading cases are the following: Pumpelly v. Green Bay Co., 13 Wall. 166; Lee v. Pembroke Iron Co., 57 Me. 481; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; Weaver v. Miss. etc. Boom Co., 28 Minn. 534; S. C. 30 Minn. 477; McKenzie v. Miss. etc. Boom Co., 29 Minn. 288; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Arimond v. Green Bay etc. Co., 31 Wis. 316; Same v. Same, 35 Wis. 41. Of numerous other cases in support of the text we cite the following: Böttoms v. Brewer, 54 Ala. 288; Martin ex parte, 13 Ark. 198; Davis v. Sacramento, 59 Cal. 596; Hill v. Ward, 2 Gil. (Ill.) 285; Trustees of Wabash & Erie Canal v. Spears, 16 Ind. 441; Hebron Gravel Road Co. v. Harvey, 90 Ind.

not authorized by law, unless the authority under which they are constructed, is practically incapable of execution

192; *Barrett v. Bangor*, 70 Me. 335; *Estabrooks v. Peterborough*, 12 Cush. 224; *Treat v. Bates*, 27 Mich. 393; *Mississippi Central R. R. Co. v. Mason*, 51 Miss. 234; *Silver Creek Nav. and Imp. Co. v. Mangum*, 64 Miss. 682; *Earnes v. City of Hannibal*, 71 Mo. 449; *Young v. City of Kansas*, 27 Mo. App. 101; *Omaha & Rep. Valley R. R. Co. v. Standen*, 22 Neb. 343; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Delaware etc. Canal Co. v. Lee*, 22 N. J. L. 243; *Crittenden v. Wilson*, 5 Cow. 165; *Barclay R. R. & Coal Co. v. Ingham*, 36 Pa. St. 194; *Willey v. Hunter*, 57 Vt. 479; *St. Louis etc. R. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. Rep. 170; *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *Richardson v. City of Eureka*, 96 Cal. 443, 31 Pac. Rep. 458; *Georgia etc. R. R. Co. v. Berry*, 78 Ga. 744; *Ohio etc. R. R. Co. v. Wachter*, 123 Ills. 440; *Chicago, B. & Q. R. R. Co. v. Schaffer*, 124 Ills. 112, affirming 26 Ills. App. 280; *Kankakee & S. R. R. Co. v. Horan*, 131 Ills. 288, 23 N. E. Rep. 621; *S. C. 30 Ills. App. 552*; *Ohio & M. R. R. Co. v. Ramey*, 139 Ills. 9, 28 N. E. Rep. 1087; *Ohio & M. R. R. Co. v. Webb*, 142 Ills. 402, 32 N. E. Rep. 527; *Ohio & M. R. R. Co. v. Thillman*, 143 Ills. 127, 32 N. E. Rep. 529; *S. C. 43 Ills. App. 78*; *Fenter v. Toledo etc. R. R. Co.*, 29 Ills. App. 250; *Ohio & M. R. R. Co. v. Combs*, 43 Ills. App. 119; *Ohio & M. R. R. Co. v. Neutzel*, 43 Ills. App. 108; *St. Louis etc. R. R. Co. v. Winkleman*, 47 Ill. App. 276; *Ohio & M. R. R. Co. v. Long*, 52 Ill. App. 670; *City of Centerville v. Wright*, 58 Ill. App. 51; *City of Pickneyville v. Hutchings*, 63 Ill. App. 137; *City of Pickneyville v. Rhine*, 63 Ill. App. 139; *Madison v. Ross*, 3 Ind. 236; *Noe v. Chicago B. & Q. R. R. Co.*, 76 Ia. 360, 41 N. W. Rep. 42; *Lawrence v. Fairhaven*, 5 Gray 110; *Proctor v. Old Colony R. R. Co.*, 154 Mass. 251, 28 N. E. Rep. 13; *Miller v. Cornwell*, 71 Mich. 270, 38 N. W. 912; *Doorman v. Ames*, 12 Minn. 451; *Byrne v. Minn. & St. Louis R. R. Co.*, 38 Minn. 212, 36 N. W. Rep. 339; *Young v. City of Kansas*, 27 Mo. App. 101; *Bird v. Hannibal & St. J. R. R. Co.*, 30 Mo. App. 365; *McKee v. St. Louis etc. R. R. Co.*, 49 Mo. App. 174; *Rose v. St. Charles*, 49 Mo. 509; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Benedict v. State*, 120 N. Y. 228, 24 N. E. Rep. 314; *Emry v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 9 S. E. Rep. 139; *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, 24 S. E. Rep. 730; *Adams v. Durham & N. R. R. Co.*, 110 N. C. 325, 14 S. E. Rep. 857; *Knight v. Albemarle & R. R. Co.*, 111 N. C. 80, 15 S. E. Rep. 929; *Wallace v. Columbia & G. R. R. Co.*, 37 S. C. 335, 16 S. E. Rep. 35; *Gulf etc. R. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. Rep. 611; *Gulf etc. R. R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. Rep.



without causing such obstruction.<sup>98</sup> In that case the damages caused by the interference with the natural flow of the stream are a taking, and compensation must be made according to the constitution.<sup>99</sup> But if such interference can be avoided by the exercise of reasonable care and skill, then the interference is not authorized, and the works which cause it are a nuisance. Many of the cases already referred to in this section go upon this ground, and there are many more of the same purport.<sup>1</sup> Some of the cases imply that

441; *Dallas & W. R. R. Co. v. Kinnard* (Tex. Supm.), 18 S. W. Rep. 1062; *Texas Trunk R. R. Co. v. Elan*, 1 Tex. Civ. App. 201; *Atlantic & D. R. R. Co. v. Peake*, 87 Va. 130, 12 S. E. Rep. 348; *Arlmond v. Green Bay etc. Co.*, 35 Wis. 41; *Jones v. United States*, 48 Wis. 385; *Velte v. United States*, 76 Wis. 278, 45 N. W. Rep. 119; *Woodruff v. Mining Co.*, 18 Fed. Rep. 753; *King v. United States*, 59 Fed. Rep. 9; *Paine Lumber Co. v. United States*, 55 Fed. Rep. 854; *High Bridge Lumber Co. v. United States*, 69 Fed. Rep. 320, 16 C. C. A. 460; *Baltimore v. Merryman*, 86 Md. 584.

<sup>98</sup> *Morton v. New York*, 140 N. Y. 207, 35 N. E. Rep. 490; *Mundy v. New York etc. R. R. Co.*, 75 Hun 479, 27 N. Y. Supp. 469; and many of the cases cited in last note.

<sup>99</sup> Cases cited in note 97.

<sup>1</sup> In addition to the cases cited in the last section, the following are more especially based upon negligence: *St. Louis etc. R. R. Co. v. Brown*, 34 Ill. App. 552; *Peoria etc. R. R. Co. v. Barton*, 38 Ills. App. 469; *Chicago & A. R. R. Co. v. Willis*, 53 Ill. App. 603; *Kansas City v. Slangstran*, 53 Kan. 431, 36 Pac Rep. 706;

*Culver v. Chicago etc. R. R. Co.*, 38 Mo. App. 130; *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271; *McCleneghan v. Omaha etc. R. R. Co.*, 25 Neb. 531, 41 N. W. Rep. 350; *Omaha etc. R. R. Co. v. Brown*, 29 Neb. 492, 46 N. W. Rep. 39; *Omaha etc. R. R. Co. v. Standen*, 29 Neb. 622, 46 N. W. Rep. 46; *Mundy v. New York etc. R. R. Co.*, 75 Hun 479, 27 N. Y. Supp. 469; *Higgins v. New York etc. R. R. Co.*, 78 Hun 567, 29 N. Y. Supp. 563; *Knight v. Albemarle etc. R. R. Co.*, 110 N. C. 58, 14 S. E. Rep. 650; *Krug v. Borough of St. Mary's*, 152 Pa. St. 37, 25 Atl. Rep. 161; *Wallace v. Columbia etc. R. R. Co.*, 34 S. C. 62, 12 S. E. Rep. 815; *Sabine etc. R. R. Co. v. Broussard*, 75 Tex. 597, 12 S. W. Rep. 1126; *Taylor v. B. & O. R. R. Co.*, 33 W. Va. 39, 10 S. E. Rep. 29; *Hodge v. Lehigh Val. R. R. Co.*, 56 Fed. Rep. 195; *Philadelphia etc. R. R. Co. v. Smith*, 64 Fed. Rep. 679, 12 C. C. A. 384; *Moison v. Great Western R. R. Co.*, 14 U. C. Q. B. 109; *Georgia R. & B. Co. v. Bohler*, 98 Ga. 184; *Missouri Pac. R. R. Co. v. Webster*, 3 Kan. App. 166, 42 Pac. Rep. 845; *Illinois Cent. R. R. Co. v. Wilbourn*, 74 Miss. 284; *Orvis v.*

if reasonable care and skill have been exercised to avoid injury to neighboring proprietors, there is no liability, although the flow of the stream is obstructed to their damage.<sup>2</sup> But we apprehend that the question of care and skill is one which affects the remedy only and not the liability. If the works are constructed with due care and skill they are not a nuisance, and the only remedy is one for compensation, and the damages must be recovered once for all.<sup>3</sup> If otherwise, then the works may be prevented by injunction,<sup>4</sup> or abated as a nuisance,<sup>5</sup> and successive actions may be brought as damages are sustained.<sup>6</sup> The practical outcome of the cases is that a work which interferes with the flow of a stream, either at its ordinary height or in case of such floods as are to be anticipated, is negligently constructed, and the only exemption from liability is in those cases where the damage is caused by a flood of such an extraordinary and unprecedented character as to amount to an act of God.<sup>7</sup>

Elmira etc. R. R. Co., 17 App. Div. N. Y. 187.

<sup>2</sup> See especially *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. Rep. 706; *McCleneghan v. Omaha etc. R. R. Co.*, 25 Neb. 531, 41 N. W. Rep. 350; *Wallace v. Columbia etc. R. R. Co.*, 34 S. C. 62, 12 S. E. Rep. 815; *Georgia R. & B. Co. v. Bohler*, 98 Ga. 184; *Illinois Central R. R. Co. v. Wilbourn*, 74 Miss. 284.

<sup>3</sup> *Ohio etc. R. R. Co. v. Wachter*, 123 Ills. 440; *City of Centralia v. Wright*, 58 Ills. App. 51; *Bird v. Hannibal etc. R. R. Co.*, 30 Mo. App. 365.

<sup>4</sup> *Lake Erie & W. R. R. Co. v. Young*, 135 Ind. 426, 35 N. E. Rep. 177.

<sup>5</sup> *Miller v. Cornwell*, 71 Mich. 270, 38 N. W. Rep. 912.

<sup>6</sup> *Ohio etc. R. R. Co. v. Thillman*, 143 Ills. 127, 32 N. E. Rep. 529; *St. Louis etc. R. R. Co. v. Brown*, 34 Ills. App. 552; *Chicago & A. R. R. Co. v. Willi*, 53 Ills. App. 603; *Byrne v. Minn. & St. L. R. R. Co.*, 38 Minn. 212, 36 N. W. Rep. 339; *Adams v. Durham etc. R. R. Co.*, 110 N. C. 325, 14 S. E. Rep. 857; and see Post § 653c.

<sup>7</sup> *Omaha & R. V. R. R. Co. v. Brown*, 14 Neb. 170; *Bellinger v. New York Central R. R. Co.*, 23 N. Y. 42; *Burchardt v. Wausau Boom Co.*, 54 Wis. 107; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Gulf etc. R. R. Co. v. Pomeroy*, 67 Tex. 498; *Ohio etc. R. R. Co. v. Ramey*, 139 Ills. 9, 28 N. E. Rep. 1087; *Ohio etc. R. R. Co. v. Webb*, 142 Ills. 402, 32 N. E. Rep. 527; *Ohio etc. R. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. Rep.

In the case of damages by flooding, it is immaterial whether the flooding is continuous and permanent or only occasional. Where the works of a boom company cause lands to be occasionally flooded and obstructed by stranded logs, there is a taking to the extent of the injury.<sup>8</sup> It has been held in New York and Ohio that merely raising the water in the channel of a stream without producing any actual injury affords no ground of action,<sup>9</sup> but a contrary view is taken by the Supreme Court of North Carolina,<sup>10</sup> but if damage results, as by rendering abutting land wet and soggy, an action will lie;<sup>11</sup> so if the water is set back upon a mill.<sup>12</sup> Where a city or railroad company undertakes to make a new channel for a creek, it interferes with the stream at its peril, and if, by reason of the insufficiency of the new channel, lands are flooded, it will be liable.<sup>13</sup>

529; S. C. 43 Ill. App. 78; Madison v. Ross, 3 Ind. 236; Doorman v. Ames, 12 Minn. 451; Higgins v. New York etc. R. R. Co., 78 Hun 567, 29 N. Y. Supp. 563; Mundy v. New York etc. R. R. Co., 75 Hun 479, 27 N. Y. Supp. 469; Taylor v. B. & O. R. R. Co., 33 W. Va. 39, 10 S. E. Rep. 29; Alabama Great Southern R. R. Co. v. Shahan, 116 Ala. 302, 22 So. Rep. 509; New York etc. R. R. Co. v. Hamlet Hay Co., 149 Ind. 344; St. Louis etc. R. R. Co. v. Sullivan, 7 Kan. App. 527; Penley v. Me. Cent. R. R. Co., 92 Me. 59, 42 Atl. Rep. 233; Kenney v. Kansas City etc. R. R. Co., 74 Mo. App. 301; Chicago etc. R. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. Rep. 540; Ridley v. Seaboard etc. R. R. Co., 124 N. C. 34; Tonnes v. Augusta, 52 S. C. 396, 29 S. E. Rep. 651.

<sup>8</sup> Weaver v. Mississippi & Rum River Boom Co., 28 Minn.

534; S. C. 30 Minn. 477; McKenzie v. Same, 29 Minn. 288.

<sup>9</sup> Cooper v. Hall, 5 Ohio, 320; People v. Canal Appraisers, 13 Wend. 355. But this is certainly the violation of a right and should entitle the upper proprietor to nominal damages. Canal Appraisers v. People, 17 Wend. 603.

<sup>10</sup> Little v. Stanbank, 63 N. C. 285. See Ante § 63.

<sup>11</sup> Athens Mfg. Co. v. Rucker, 80 Ga. 292.

<sup>12</sup> Gibson v. Fisher, 68 Ia. 29; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Barclay R. R. & Coal Co. v. Ingham, 36 Pa. St. 194; Tinsman v. Belvidere Del. R. R. Co., 26 N. J. L. 148; Lee v. Pembroke Iron Co., 57 Me. 481; Heath v. Williams, 25 Mo. 209; Riddle's Exrs. v. Delaware County, 156 Pa. St. 643, 27 Atl. Rep. 569; Rosser v. Randolph, 7 Porter, 238.

<sup>13</sup> St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; Kankakee

A lake had its outlet through a bed of porous gravel, which outlet was obstructed by a gravel-road company, causing the lake to rise and flood the plaintiff's land. The company was held liable.<sup>14</sup> Where one has a right to maintain a dam at a certain height, he will not be liable for additional flooding caused by repairing the dam and making it tight.<sup>15</sup>

§ 67a. **Bridges—authority to construct—damages thereby—interfering with navigation.**—Congress has paramount authority over interstate commerce and over the ways and means of transportation for such commerce.<sup>16</sup> It may, therefore, control rivers navigable for such commerce and authorize bridges in aid of such commerce.<sup>17</sup> The States may authorize bridges over navigable streams wholly within their limits, subject to the power of congress to regulate and control the same.<sup>18</sup> A bridge between two States can only be authorized by congress or by the concurrence of

etc. *R. R. Co. v. Horan*, 30 Ills. App. 552; affirmed 131 Ills. 288, 23 N. E. Rep. 621; *Barnes v. Hannibal*, 71 Mo. 449; *Bird v. Hannibal etc. R. R. Co.*, 30 Mo. App. 365; *Adams v. Durham & R. Co.*, 110 N. C. 325, 14 S. E. Rep. 857.

<sup>14</sup> *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192. To same effect, *Troe v. Larson*, 84 Ia. 649, 51 N. W. Rep. 179.

<sup>15</sup> *Cowell v. Thayer*, 5 Met. 253; *Jackson v. Harrington*, 2 Allen, 242. But where there is a prescriptive right to flood certain land, and a new dam, tighter but not higher, causes additional flooding and saturating, there is a liability. *Powell v. Lash*, 64 N. C. 456. Where a person has a right to maintain a dam at a certain height, it is no ground of complaint that, because of non-use of mill, the water stands higher than it otherwise would.

*Daniels v. Citizens Savings Institution*, 127 Mass. 534.

<sup>16</sup> *Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 418, 10 S. C. Rep. 462, 2 Am. R. R. & Corp. Rep. 564 and note.

<sup>17</sup> *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 S. C. Rep. 891; *Stockton v. Baltimore etc. R. R. Co.*, 32 Fed. Rep. 9.

<sup>18</sup> *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. C. Rep. 811; *Chicago v. McGinn*, 51 Ills. 266; *State v. Leighton*, 83 Me. 419, 22 Atl. Rep. 380; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Clark v. Birmingham etc. Co.*, 41 Pa. St. 147; *Monangahela Bridge Co. v. Kirk*, 46 Pa. St. 112; *Rhea v. Newport etc. R. R. Co.*, 50 Fed. Rep. 16; *Oregon City Trans. Co. v. Columbia St. Bridge Co.*, 53 Fed. Rep. 549; *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *People v. Jessup*, 160 N. Y. 249; reversing 28 App. Div. 524.

both States.<sup>19</sup> The subject of damages to private property by bridges has been considered in the preceding sections. The question of authority does not fall within the province of this treatise, but in case of damage to property would be important as affecting the remedy.<sup>20</sup> The interference with navigation by an authorized bridge affords no cause of action to those who are merely inconvenienced thereby.<sup>21</sup> If the bridge is unauthorized, or if the interference is due to the bridge being negligently or improperly constructed or managed, it is otherwise.<sup>22</sup> But where the bridge interferes with access to property there is a remedy.<sup>23</sup> And in Michigan it has been held that a riparian owner may enjoin the erection of a bridge without a draw, which will prevent navigation between his mill and a railroad station, although the bridge would not interfere with access to his property from the navigable water.<sup>24</sup>

**§ 68. Making a private stream public, or navigable, by statute.**—As we have already stated, streams which are not navigable are wholly private property. The riparian owner, by means of dams, or otherwise, may make a reasonable use of the water as it flows over his land. An act of the legislature declaring such a river public, or navigable, will not affect such rights, and the riparian owner

<sup>19</sup> *President v. Trenton City Bridge Co.*, 13 N. J. Eq. 46.

<sup>20</sup> One whose property will be damaged thereby may enjoin the erection of an unauthorized bridge. *Riddle v. Del Co. Comrs.*, 3 Pa. Co. Ct., 598, 600, 605; and see *Stofflet v. Estes*, 104 Mich. 208, 62 N. W. Rep. 347.

<sup>21</sup> *Commonwealth v. Breed*, 4 Pick. 460; *Clarke v. Birmingham etc. R. R. Co.*, 41 Pa. St. 147; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; *State v. Leighton*, 83 Me. 419, 22 Atl. Rep. 380; *Silver v. Mo. Pac. R. R. Co.*, 101 Mo. 79, 13 S. W. Rep. 410; *Pen-*

*sacola & A. R. R. Co. v. Hyer*, 32 Fla. 539, 14 So. Rep. 381; *Cantwell v. Knoxville etc. R. R. Co.*, 90 Tenn. 638, 18 S. W. Rep. 271.

<sup>22</sup> *Oregon City Trans. Co. v. Columbia St. Bridge Co.*, 53 Fed. Rep. 549; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 59 Fed. Rep. 192, 8 C. C. A. 86; *Farmers' Co-op. Mfg. Co. v. Albemarle etc. R. R. Co.*, 117 N. C. 579, 23 S. E. Rep. 43; *Delaware etc. R. R. Co. v. Mehrhof Bros. Mfg. Co.*, 53 N. J. L. 205, 23 Atl. Rep. 170.

<sup>23</sup> *Post* § 84a.

<sup>24</sup> *Stofflet v. Estes*, 104 Mich. 208, 62 N. W. Rep. 347.

cannot be deprived of the use of the water,<sup>25</sup> or his private works on the stream interfered with without compensation.<sup>26</sup> Compensation must be made for all damages occasioned to private rights by improvements making such a stream navigable in fact.<sup>27</sup>

§ 69. **Rights of riparian owners on private navigable streams.**—Private streams which are navigable are public highways by water, and the rights of riparian proprietors thereon are subject to the paramount right of the public to use and improve the stream as such highway.<sup>28</sup> In all other respects riparian owners have the same rights as upon private, non-navigable streams, and the further right of making use of the navigable waters in connection with their property, including the right to build piers, booms and the like.<sup>29</sup> "The public right is one of passage, and nothing more; as in a common highway. It is called by the cases an easement and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement."<sup>30</sup> The Court of Appeals of New York, in a recent opinion, speaking of this easement, says: "It is an elementary principle that all easements are limited to the very purpose for which they were created, and their enjoyment cannot be extended by implication. This right, being founded upon the public benefit supposed to be derived from their use as a highway, cannot be extended to a different purpose inconsistent with its original use."<sup>31</sup> And again in another case: "The legis-

<sup>25</sup> *Walker v. Board of Public Works*, 16 Ohio 540.

<sup>26</sup> *Morgan v. King*, 35 N. Y. 454; *S. C.* 18 Barb. 277; *De Camp v. Thomson*, 16 App. Div. N. Y. 528.

<sup>27</sup> *Macdonnell v. Caledonia Canal Commissioners*, 8 Shaw & Dunl. 881; *White Deer Creek Improvement Co. v. Sassaman*, 67 Pa. St. 415; *De Camp v. Dix*, 159 N. Y. 436, 54 N. E. Rep. 63; *Brewster v. Rogers Co.*, 42 N. Y.

App. Div. 343. See Post § 85a.

<sup>28</sup> *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 1; *S. C.* affirmed, 27 N. J. Eq. 631; *Brown v. Chadbourne*, 31 Me. 9; *Treat v. Lord*, 42 Me. 552; *Dwinel v. Veazie*, 44 Me. 167.

<sup>29</sup> Post, §§ 77-83.

<sup>30</sup> *Ex parte Jennings*, 6 Cow. 518, 527.

<sup>31</sup> *Smith v. Rochester*, 92 N. Y. 463, 483.

lature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh-water streams than over other private property. It may make laws for regulating booms, dams, ferries and bridges, only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the constitution."<sup>32</sup> These conclusions, so well put by the New York court, state fully and correctly the rights of riparian owners upon private navigable streams, and the limitations to which they are subject, and are fully sustained by the authorities.<sup>33</sup> These limitations necessarily prevent any structure on the bed or banks of the stream which interferes with navigation, such as a dam,<sup>34</sup> or boom,<sup>35</sup> and all such structures are nuisances and may be abated.<sup>36</sup>

§ 70. **An interference with such rights is a taking.**—Such being the rights of the riparian owner upon a private navigable stream, it follows that any interference with these rights, under legislative sanction, for any purpose not connected with the navigation of the stream, is a taking.<sup>37</sup> The water cannot be taken as a feeder for a canal,<sup>38</sup> or to supply a town with water,<sup>39</sup> or for any public purpose without compensation. Any interference with the accustomed flow of the stream, in its quantity, quality or uniformity, to the damage of a riparian proprietor, except for the improvement of navigation, will be actionable, and the authorities

<sup>32</sup> *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185.

<sup>33</sup> *Hooker v. Cummings*, 20 Johns. 90, 99; *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421; *Canal Commissioners v. Kempshall*, 26 Wend. 404.

<sup>34</sup> *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Woodward v. Kilbourn Mfg. Co.*, 1 Abb. U. S. C. 158.

<sup>35</sup> *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *S. C.* 46 Wis. 237.

<sup>36</sup> *Altee v. Packet Co.*, 21 Wall. 389.

<sup>37</sup> *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185.

<sup>38</sup> *Ex parte Jennings*, 6 Cow. 518; *Canal Commissioners v. Kempshall*, 26 Wend. 404.

<sup>39</sup> *Smith v. Rochester*, 92 N. Y. 463.

heretofore referred to in treating of non-navigable streams apply with full force. A statute making it unlawful to drive piles, or build piers, cribs or other structures in the bed of a private navigable river, without regard to whether the same obstruct navigation, was held invalid, as depriving the riparian owners of their property without compensation and without due process of law.<sup>40</sup>

§ 71. *Damages by reason of improving navigation.*—The public easement in a private navigable stream includes not only the right to use, but also the right to improve. The public may make such changes and construct such works in the bed of the stream, as may be deemed necessary to promote its usefulness and efficiency as a highway.<sup>41</sup> If such improvements change the current of the stream so as to wash away the land of a proprietor, it is *damnum absque injuria*.<sup>42</sup> The riparian owner, in such case, must protect his bank. But, if such works cause private property to be overflowed, compensation must be made.<sup>43</sup> The banks of the stream, being private property, cannot be occupied

<sup>40</sup> *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128.

<sup>41</sup> *Spring v. Russell*, 7 Me. 273; *Osborne v. Knife Falls Boom Corp.*, 32 Minn. 412; *Falls Mfg. Co. v. Oconto Riv. Impv. Co.*, 87 Wis. 134, 58 N. W. Rep. 257; *Scranton v. Wheeler*, 57 Fed. Rep. 803, 6 C. C. A. 585; *Gibson v. United States*, 166 U. S. 269, 17 S. C. Rep. 578; *Scranton v. Wheeler*, 113 Mich. 565, 71 N. W. Rep. 1091; *Doucette v. Little Falls Imp. & Nav. Co.*, 71 Minn. 206, 73 N. W. Rep. 847; and cases cited in succeeding notes. In *Thompson v. Androscoggin Riv. Impv. Co.*, 58 N. H. 108, it is held that the right of the public is one of reasonable use and to make reasonable improvements in aid of that use, and that, for

damages resulting from unreasonable improvements, a recovery may be had.

<sup>42</sup> *Hollister v. Union Co.*, 9 Conn. 436; *Brooks v. Cedar Brook Impv. Co.*, 82 Me. 17, 19 Atl. Rep. 87. But it is held that one State cannot authorize works for the improvement of navigation which will produce damage, either direct or consequential, to lands in another State. *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131; 52 Conn. 570.

<sup>43</sup> *Arimond v. Green Bay & Mississippi Canal Co.*, 31 Wis. 316; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308; *Carpenter v. Board of Comrs.*, 56 Minn. 513, 58 N. W. Rep. 295; see also ante, § 67.



without compensation.<sup>44</sup> It has been held in Wisconsin that a side chute, or subsidiary channel, though forming a navigable connection with the main stream, may be closed for the purpose of turning all the water into the principal channel, and that a proprietor upon the former, who is thus cut off from all access to the river, is not entitled to compensation.<sup>45</sup> The Supreme Court of Mississippi has gone so far as to hold that a stream may be turned into an entirely new channel without compensation to those whose use of it is thus destroyed.<sup>46</sup> The latter decision seems to us erroneous. The public right is a right of passage only, including the right to improve the navigation. It is necessarily limited to the bed of the stream.<sup>47</sup> So far as the water is concerned, it can only use it for navigation; it cannot take it or divert it.<sup>48</sup> The public easement includes the right to make any use of the water or bed of the stream, for promoting the navigation of the stream itself, which the legislature deems expedient. But the public right is one of passage only, and improvements can be made only for that purpose. While these general principles are admitted by all, there is much diversity in their application. It has recently been held in Wisconsin that it was competent to confer upon a corporation the exclusive right of constructing and operating booms for a certain distance on the Wisconsin River, where the result was not only to deprive the riparian owner of the right or privilege of constructing a boom opposite his own bank, but also to cut him off from the navigable part of the river.<sup>49</sup> Plaintiff had about two thousand feet of frontage on the river and was owner of timber lands above. The channel was about two hundred feet from shore. He had bought the property for the pur-

<sup>44</sup> *Cotton v. Mississippi & Rum River Boom Co.*, 19 Minn. 497; *Perry v. Wilson*, 7 Mass. 393.

<sup>45</sup> *Black River Improvement Co. v. La Crosse Booming & Trans. Co.*, 54 Wis. 659.

<sup>46</sup> *Commissioners of Homochitto River v. Withers*, 29 Miss. 21. This case was taken to the Su-

preme Court of the United States, but there dismissed for want of jurisdiction; *Withers v. Buckley*, 20 How. 84.

<sup>47</sup> *Weaver v. Miss. & Rum River Boom Co.*, 28 Minn. 534, 538.

<sup>48</sup> See cases cited ante, § 62.

<sup>49</sup> *Cohn v. Wausau Boom Co.*, 47 Wis. 314.

pose of erecting saw mills thereon and with a view to constructing in front thereof booms for storing logs. The defendant company constructed a boom along the whole front of his land, extending from near the shore to the channel. The maintenance of the defendant's works would virtually ruin his property. The court held the defendant's works to be a legitimate exercise of the public easement of navigation, that no property of the plaintiff's was taken, and that he was not entitled to any relief.<sup>50</sup> Undoubtedly a boom in such a stream is a work of public utility for which property may be taken.<sup>51</sup> But the construction of a boom for the storing, sorting and handling of logs can hardly be called an improvement of the right of passage in a stream. It is a legitimate use of highways to drive cattle along them, and the public may make the ways safe and convenient for that purpose; but it would not be contended that this would justify the construction of cattle yards in front of a man's door to enable the drover to feed, water, rest or sell his stock.<sup>52</sup> The right of access to the navigable part of the river<sup>53</sup> and the right to construct booms for

<sup>50</sup> *Osborne v. Boom Corp.*, 32 Minn. 412.

<sup>51</sup> *Cotton v. Mississippi & Rum River Boom Co.*, 22 Minn. 372; Post, § 177.

<sup>52</sup> We wish to credit this illustration, which is a very apt one, to its proper source. In *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 319, Christlancy, J., says: "This river, so far as it is navigable for vessels, or floatable for logs, is but a public highway by water; the right to navigate the one or float the other is but a right of passage, including only such rights as are incident to that right and necessary to render it reasonably available. And though the drover has the right to drive his herds of cattle along a public road, no one will

contend that he has a right to convert a certain length of the highway into a cattle yard, and occupy it for that purpose for months or weeks, or even a day, while he is purchasing, collecting and bringing in his droves, assorting, dividing or selling them. \* \* \* Every man sees at once that, however convenient such right might be to the drover, and however necessary to enable him to make his business profitable, it is a convenience and necessity for which he must pay."

<sup>53</sup> *Rumsey v. New York etc. R. Co.*, 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. R. & Corp. Rep. 67; *Hedges v. West Shore etc. R. Co.*, 80 Hun 310, 30 N. Y. Supp. 92; *Bigaouette v. North*

logs adjacent to one's premises,<sup>54</sup> which do not interfere with the public use of the stream, are valuable riparian rights which cannot be taken or impaired without compensation.<sup>55</sup> A lighthouse, being in aid of navigation, may be built in the bed of the stream without compensation to the riparian owner.<sup>56</sup> A dike built in aid of navigation so changed the current as to prevent access to the plaintiff's wharf below, except in high water. It was held that there was no taking and no liability.<sup>57</sup> Where the riparian owner's title extends to the middle of the stream, the appurtenances of a bridge cannot be placed in the bed of the stream without compensation.<sup>58</sup>

§ 72. What streams are public.—At common law all streams and waters where the tide ebbed and flowed were regarded as navigable, and the soil below high water mark was held to be in the public. All other waters were regarded as private property.<sup>59</sup> In this country, with its great inland lakes and rivers, there has been some tendency to depart from the common law doctrine, but no definite rule has been enunciated by any State by which it can be determined in any given case whether the title to the bed of a stream is in the public or the riparian owners. The Supreme Court of the United States, after originally confining admiralty jurisdiction to tide waters, in accordance with the common law of England,<sup>60</sup> at length overcame the force of English precedent and extended that jurisdiction to all waters navigable in fact for purposes of commerce, without regard to the ebbing and flowing of the tide;<sup>61</sup> and

Shore R. R. Co., 17 Duvall, 363; Post, § 77-83.

<sup>54</sup> Williamsburg Boom Co. v. Smith, 84 Ky. 372.

<sup>55</sup> Post, § 84 et seq.

<sup>56</sup> Hawkins Point Light House Case, 39 Fed. Rep. 77.

<sup>57</sup> Gibson v. United States, 166 U. S. 269, 17 S. C. Rep. 578.

<sup>58</sup> Ballance v. Peoria, 180 Ills. 29.

<sup>59</sup> De Juris Maris, Part I, C. 2;

Angell on Watercourses, §§ 542-551; Wood on Nuisances, (1st ed.) § 575; Gould on Waters, chap. iii.

<sup>60</sup> The Thomas Jefferson, 10 Wheat. 428; The Steamboat New Orleans v. Phoebus, 11 Peters, 175.

<sup>61</sup> The propeller Genesee Chief, 12 How. 443; The Magnolia, 20 How. 296; A. O. Hine v. Trevor, 4 Wall. 555.

even where the river was only rendered navigable for boats of any size by means of locks and canals, as in the case of the Fox River, Wisconsin.<sup>62</sup> Most of the States have adhered to the common law rule. Of these are Kentucky,<sup>63</sup> Maine,<sup>64</sup> New Hampshire,<sup>65</sup> Massachusetts,<sup>66</sup> Connecticut,<sup>67</sup> Maryland,<sup>68</sup> Virginia,<sup>69</sup> Ohio,<sup>70</sup> Indiana,<sup>71</sup> Illinois,<sup>72</sup> Michigan,<sup>73</sup> Mississippi,<sup>74</sup> and Wisconsin.<sup>75</sup> On the other hand several of the States have held some of our large inland rivers to be public streams, in the fullest sense of the term. This has always been the doctrine in Pennsylvania, which holds the title to navigable streams to be in the public from low water mark.<sup>76</sup> Several decisions in Iowa in re-

<sup>62</sup> The Montello, 20 Wall. 430.

<sup>63</sup> Williamsburg Boom Co. v. Smith, 84 Ky. 372.

<sup>64</sup> Berry v. Carle, 3 Greenl. 269; Lapish v. Bangor Bank, 8 Greenl. 85; Springer v. Russell, 7 Me. 273; Simpson v. Seavy, 8 Me. 138; Wadsworth v. Smith, 11 Me. 278; Brown v. Chadbourne, 31 Me. 9; Knox v. Chaloner, 42 Me. 150; Granger v. Avery, 64 Me. 292.

<sup>65</sup> Scott v. Wilson, 3 N. H. 321; State v. Gilmanton, 9 N. H. 461; State v. Canterbury, 28 N. H. 195; Norway Plaines Co. v. Bradley, 52 N. H. 86.

<sup>66</sup> Commonwealth v. Chapin, 5 Pick. 199; Gray v. Bartlett, 20 Pick. 186.

<sup>67</sup> Adams v. Pease, 2 Conn. 481; Chapman v. Kimball, 9 Conn. 38; East Haven v. Hemingway, 7 Conn. 186; Middleton v. Sage, 8 Conn. 221.

<sup>68</sup> Brown v. Kennedy, 5 H. & J. 195.

<sup>69</sup> Hays v. Bowman, 1 Rand. 417; Mead v. Haynes, 3 Rand. 33.

<sup>70</sup> Gavit v. Chambers, 3 Ohio, 495; Lamb v. Rickets, 11 Ohio,

311; Walker v. Board of Public Works, 16 Ohio, 540.

<sup>71</sup> Cox v. State, 3 Blackf. 193; Porter v. Allen, 8 Ind. 1; Sherlock v. Bainbridge, 41 Ind. 35, 41; Ross v. Faust, 54 Ind. 471.

<sup>72</sup> Middletown v. Pritchard, 3 Scam. 510; People v. St. Louis, 5 Gil. 351; Seaman v. Smith, 24 Ills. 523; Hubbard v. Bell, 54 Ills. 112; Braxton v. Bressler, 64 Ills. 488.

<sup>73</sup> La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. 155; Lorman v. Benson, 8 Mich. 18; Rice v. Ruddiman, 10 Mich. 125; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. Rep. 469.

<sup>74</sup> Morgan v. Reading, 3 S. & M. 366; Steamboat Magnolia v. Marshall, 39 Miss. 109.

<sup>75</sup> Jones v. Pettibone, 2 Wis. 308; Mariner v. Shulte, 13 Wis. 692; Arnold v. Elmorie, 16 Wis. 509; Olsen v. Merrill, 42 Wis. 203.

<sup>76</sup> Carson v. Blazer, 2 Binn. 475; Shrunk v. Schuykill Navigation Co., 14 S. & R. 71; Union Canal Co. v. Landis, 9 Watts. 228; Coovert v. O'Connor, 8 Watts, 470; Barclay Road v. Ing-

lation to the Mississippi River have held the title to the bed of the stream to be in the public from high water mark.<sup>77</sup> Several other States have held or inclined to similar views.<sup>78</sup> The Supreme Court of the United States, while holding that the question is one of State policy and State law,<sup>79</sup> yet inclines to approve the doctrine maintained by the Iowa court.<sup>80</sup> The decisions in New York are seemingly conflicting, but the common law doctrine may be said to prevail, except as to the Mohawk and Hudson. These rivers are exceptional, owing to the fact that they were originally under the jurisdiction of the Dutch, and through them were, so to speak, impressed with the doctrines of the civil law.<sup>81</sup> As we have before said, it is not within the purview of this treatise to examine these decisions and work out the true doctrine in respect to the title to navigable streams. The subject is fully treated by Gould in his recent work on Waters, where all the authorities are referred to and discussed.<sup>82</sup> We have referred to the question here for the purpose of showing how it stands. The question which con-

ham, 36 Pa. St. 194, 201; Flanagan v. Philadelphia, 42 Pa. St. 219; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. Rep. 726.

<sup>77</sup> McManus v. Carmichael, 3 Ia. 1; Haight v. Keokuk, 4 Ia. 199; Tomlin v. Dubuque, B. & M. R. R. Co., 32 Ia. 106; Musser v. Hershey, 42 Ia. 356. In Houghton v. C. D. & M. R. R. Co., 47 Ia. 370, high water mark is defined "as co-ordinate with the limit of the river bed. What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed."

<sup>78</sup> Webb v. City of Demopolis, 95 Ala. 116, 13 S. E. Rep. 289; St. Louis etc. R. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. Rep. 931; Harlan & H. Co. v. Parchall, 5 Del. ch. 435; Gibson v. Kelly, 15 Mon.

417, 39 Pac. Rep. 517; Benson v. Morrow, 61 Mo. 345; Ravenswood v. Flemings, 22 W. Va. 52; Cates v. Waddington, 1 McCord, 580; Schurmier v. Railroad Co., 10 Minn. 82.

<sup>79</sup> Barney v. Keokuk, 94 U. S. 324.

<sup>80</sup> Railroad Co. v. Schurmier, 7 Wall. 272; Barney v. Keokuk, 94 U. S. 324.

<sup>81</sup> Canal Commissioners v. People, 5 Wend. 423, S. C. 13 Wend. 355; 17 Wend. 570; Canal Appraisers v. Kempshall, 26 Wend. 404; People v. Canal Appraisers, 33 N. Y. 461; Smith v. Rochester, 92 N. Y. 463. In the latter case prior decisions are reviewed, explained and distinguished.

<sup>82</sup> Gould on Waters, §§ 46-79.

cerns us is, what consequences follow from the title to the bed of the stream being in the public?

The boundary line between public and private ownership where the tide ebbs and flows is high water mark.<sup>83</sup> Where the tide does not ebb and flow the boundary "is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as the nature of the soil."<sup>84</sup> The owner cannot extend his ownership by filling in below high water mark.<sup>85</sup> The Des Moines River was declared navigable by Congress, and afterwards the act was repealed. It was held that the title of riparian owners was not thereby extended to the thread of the stream.<sup>86</sup>

§ 73. Rights of riparian owners on public navigable streams.—So far as these rights are connected with the navigation of the stream, we shall treat of them under the general head of "Rights of riparian owners on public waters."<sup>87</sup> We shall only discuss here the right to the flow of the stream. In New York it has been held that the State has an absolute right to appropriate the water of public streams in any way it sees fit, as to supply a city with water,<sup>88</sup> or create a feeder for a canal,<sup>89</sup> without compen-

<sup>83</sup> See cases cited in note 59.

<sup>84</sup> *Carpenter v. Board of Comrs.*, 56 Minn. 513, 58 N. W. Rep. 295; *St. Louis etc. R. R. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. Rep. 931. Whether courts define the boundary as "high water mark," or "low water mark," they probably mean the same thing in fact.

<sup>85</sup> *Diedrich v. N. W. U. R. R. Co.*, 42 Wis. 248; *People v. Comrs. of Land Office*, 135 N. Y. 447, 32 N. E. Rep. 139; *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, 13 S. C. Rep. 110; *Sweeney v. Shakespeare*, 42 La. An.

614, 7 So. Rep. 729; *Commonwealth v. Young Men's Christian Assn.*, 169 Pa. St. 24, 32 Atl. Rep. 121; but see *Hanford v. St. Paul etc. R. R. Co.*, 43 Minn. 104, 44 N. W. Rep. 1144.

<sup>86</sup> *Wood v. Chicago etc. R. R. Co.*, 60 Ia. 456; *Serrin v. Grefe*, 67 Ia. 196; *Steele v. Sanchez*, 72 Ia. 65; *Chicago etc. R. R. Co. v. Porter*, 72 Ia. 426.

<sup>87</sup> Post, §§ 77-83.

<sup>88</sup> *Crill v. Rome*, 47 How. 398.

<sup>89</sup> *Canal Commissioners v. People*, 5 Wend. 423; *S. C. 13 Wend. 355*; *17 Wend. 570*; *People v. Canal Appraisers*, 33 N. Y.

sation to the riparian owners. So it has been held in Minnesota that the water of public streams may be taken for a public water supply without compensation.<sup>90</sup> The doctrine is not without support in other States, especially in Pennsylvania.<sup>91</sup> The logic of these cases is, that a public river may be entirely appropriated by the State, so as to leave the riparian owners abutting on a dry river bed, and yet violate no right of private property. It seems to us that this is a result not to be tolerated, and that the principles which involve it are erroneous. As respects the flow of the stream, we think there is no difference between public and private navigable rivers. Though title is declared to be in the State, it holds it as a mere trustee, for the benefit of the public and the riparian owners alike. The public are beneficiaries to the extent of having a common right of passage, and perhaps of fishery; the riparian owners are beneficiaries to the extent of having a right to all those advantages which the stream affords, and which can be enjoyed without interfering with the public rights. These beneficiary rights are property, and within the protection of the constitution. They are attached to the riparian property by nature, are universally estimated as part of its value in all the dealings between man and man, and should receive the protection of the law. For a justification of these conclusions we refer to what is said further on in regard to rights in public waters.<sup>92</sup>

461. In matter of Commissioners of State Reservation at Niagara, 37 Hun. 537, affirmed in 102 N. Y. 734, it was held that a riparian owner could acquire by prescription a right to such use of the stream as did not interfere with the rights of the public, and that he was entitled to compensation when such right was taken. S. C. 15 Abb. N. C. 159 and 395.

<sup>90</sup> Minneapolis Mill Co. v. Board of Water Comrs., 56 Minn. 485, 58 N. W. Rep. 33. And see

St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349.

<sup>91</sup> See Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. Rep. 726; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. Rep. 103; Post, § 75 and cases cited.

<sup>92</sup> Post §§ 77 et seq. In St. Louis etc. R. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. Rep. 931, it is held that a riparian owner cannot maintain an action for gravel removed from the bed of

§ 74. *Interfering with the flow of public streams.*—According to the conclusions announced in the last section, any damage to riparian owners on public streams by works for any purpose not connected with the improvement of navigation is a taking for which compensation is to be made. Exactly the same rules apply as in case of private navigable streams.<sup>93</sup> Where the city of St. Louis extended a street or pier seven hundred feet into the Mississippi River, thereby destroying a channel adjacent to plaintiff's property and greatly depreciating its value, the city was held liable.<sup>94</sup> But most of the decisions on this question are of older date and adverse to the views we have expressed. We referred in the last section to some cases in relation to diverting the water of public streams,<sup>95</sup> and will now refer to some additional cases holding the same doctrine. A railroad company, authorized to cross a tidal river, constructed a bridge, the piers of which caused a change in the current of the river, which rendered additional sea wall and piling necessary in order to protect the plaintiff's land. It has held that the company was not liable. "It is incident to the power of the legislature," says the court, "to regulate a navigable stream so as best to promote the public convenience, and if, in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*."<sup>96</sup> It is difficult to reconcile this case with another in the same volume which seems to hold that precisely the same item of damages is allowable.<sup>97</sup>

a public stream by a railroad company.

<sup>93</sup> Ante, §§ 61-67.

<sup>94</sup> *Meyers v. St. Louis*, 8 Mo. Ap. 266; see also *Chapman v. Oshkosh & Miss. R. R. Co.*, 33 Wis. 629, and *Commonwealth v. Boston & Maine R. R. Co.*, 3 Cush. 25.

<sup>95</sup> See cases cited in last section.

<sup>96</sup> *Fitchburg R. R. Co. v. Bos-*

*ton & Maine R. R. Co.*, 3 Cush. 58, 88; also *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 389; to the same point, *Mississippi River Bridge Co. v. Loneragan*, 91 Ills. 508.

<sup>97</sup> *Commonwealth v. Boston & Maine R. R. Co.*, 3 Cush. 25; see also *Fowle v. N. H. & N. Co.*, 112 Mass. 334. The following cases from Pennsylvania tend to support the doctrine that the water



§ 75. **Damage to authorized works on public streams.**—It has been repeatedly held, in Pennsylvania, that, where a dam has been built on a public navigable stream, under an act of the legislature granting permission to do so, the grant is a mere license, revocable at pleasure, and that where such dam is injured or destroyed by reason of other improvements in or upon the stream, authorized by the legislature, no compensation need be made.<sup>98</sup> The Supreme Court of the United States, in a case which went up from Pennsylvania, characterize this doctrine as "somewhat peculiar," but, nevertheless, follow it as being a rule of property in that State.<sup>99</sup> In Virginia and other States it has been held, in such case, that, the legislature having granted the right to erect the dam, and the grantee having erected it, he had a vested right to maintain it which could not be taken or impaired without compensation.<sup>1</sup> This would seem to be the better rule and to be of general application to all works erected in public waters by legislative authority.<sup>2</sup>

§ 76. **Title to lakes and ponds.**—The title to the great fresh-water lakes of the United States is universally held to be in the public from low water mark.<sup>3</sup> As to the smaller

of a public stream cannot be diverted from the riparian owner without compensation. *Fulmer v. Williams*, 122 Pa. St. 191, 15 Atl. Rep. 726; *Williams v. Fulmer*, 151 Pa. St. 405, 25 Atl. Rep. 103.

<sup>98</sup> *Union Canal Co. v. Landis*, 9 Watts, 228; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *New York & Erie R. R. Co. v. Young*, 33 Pa. St. 175; *McKeen v. Delaware Canal Co.*, 49 Pa. St. 424; *Freeland v. Penn. R. R. Co.*, 66 Pa. St. 91; see also *Bailey v. Phil. W. & B. R. R. Co.*, 4 Harr. Del. 389.

<sup>99</sup> *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80, 93.

<sup>1</sup> *Crenshaw v. Slate River Co.*, 6 Rand. Va. 245; *Glover v. Powell*, 10 N. J. Eq. 211; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *State v. Glen*, 7 Jones L. 321; and see *Langdon v. Mayor etc. of New York*, 93 N. Y. 129; *Railroad Company v. Renwick*, 102 U. S. 180.

<sup>2</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. C. Rep. 622.

<sup>3</sup> *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 13 S. C. Rep. 110; *Hardin v. Jordan*, 140 U. S. 371, 382; *Diedrich v. N. W. Ry. Co.*, 42 Wis. 243; *Seaman*

lakes, varying in size from one or two to many miles in circumference, the decisions are conflicting, some holding that the title to the bed of the lake is in the riparian owners,<sup>4</sup> others that it is in the public from low water mark.<sup>5</sup> By colonial ordinances of 1641 and 1647, all great ponds in Massachusetts containing more than ten acres were made public and common forever, and in that State it has been held that the title to all such ponds below low water mark is in the public.<sup>6</sup> The rule in Minnesota is thus stated by

v. Smith, 24 Ills. 521. These cases relate to Lake Michigan, and, in the latter, the precise limit of private ownership in that lake is held to be the line where the water usually stands when unaffected by disturbing causes. *Smith v. Rochester*, 92 N. Y. at p. 479; *Canal Commissioners v. People*, 5 Wend. 423, 446; *Austin v. Rutland R. R. Co.*, 45 Vt. 215; *Revell v. People*, 177 Ill. 468, 52 N. E. Rep. 1052; *People v. Silberwood*, 110 Mich. 103.

<sup>4</sup> *Hardin v. Jordan*, 140 U. S. 371, 11 S. C. Rep. 808, 838; *Mitchell v. Smale*, 140 U. S. 406, 11 S. C. Rep. 819; *Rice v. Ruddiman*, 10 Mich. 125; *Clute v. Fisher*, 65 Mich. 48; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. Rep. 686; *Cobb v. Davenport*, 32 N. J. L. 369; *S. C. 33 N. J. L. 223*; *Ridgeway v. Ludlow*, 58 Ind. 248; *Fuller v. Shedd*, 161 Ills. 462, 44 N. E. Rep. 286; *Stoner v. Rice*, 121 Ind. 51, 22 N. E. Rep. 968; *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. Rep. 865; *Smith v. Rochester*, 92 N. Y. 463; *Ledyard v. Ten Eyck*, 36 Barb. 102. *Hardin v. Jordan*, 140 U. S. 371, 11 S. C. Rep. 808, holds the common law rule to be that the

title to small lakes and ponds is in the riparian owners.

<sup>5</sup> *Delaplaine v. C. & N. W. R. R. Co.*, 42 Wis. 214; *Boorman v. Sunnuck*, 42 Wis. 233; *State v. Gilmanton*, 9 N. H. 461; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718; *Bradley v. Rice*, 13 Me. 198; *Robinson v. White*, 42 Me. 209; *Fernold v. Knox Woolen Co.*, 82 Me. 48, 19 Atl. Rep. 93; *Trustees of Schools v. Schroll*, 120 Ills. 509; *Paine v. Woods*, 108 Mass. 160; *Fay v. Salem & D. Aqueduct Co.*, 111 Mass. 27; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. Rep. 605; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139; *Wheeler v. Spinola*, 54 N. Y. 377. The last case is distinguished, or overruled, in *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. Rep. 865. See also *Fuller v. Shedd*, 161 Ills. 462, 44 N. E. Rep. 286; *Auburn v. Union Water Power Co.*, 90 Me. 576, 38 Atl. Rep. 561; *New England T. & S. Club v. Mather*, 68 Vt. 338, 35 Atl. Rep. 323.

<sup>6</sup> *West Roxbury v. Stoddard*, 7 Allen, 158; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548;

the Supreme Court of that State in a syllabus of its own: "The same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners upon streams. Hence, if a meandered lake is 'non-navigable,' in fact, the patentee of the riparian land takes the fee to the center of the lake; but if the lake is 'navigable' in fact, its waters and bed belong to the State, in its sovereign capacity, and the riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water. The division of waters into navigable and non-navigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters."<sup>7</sup> In Michigan the title to small lakes and ponds is held to be in the riparian owners, subject to the public right of navigation.<sup>8</sup> The question as to the ownership of the bed of streams and lakes is one which each State is at liberty to determine for itself, in accordance with its own views of public law and public policy.<sup>9</sup>

The question of title then may be summarized as follows: All agree that the great lakes emptying into the St. Lawrence are public.<sup>10</sup> All agree that there is a class of lakes

Attorney General v. Revere Copper Co., 152 Mass. 444, 25 N. E. Rep. 605.

<sup>7</sup> *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139. See also *Carpenter v. Board of Commissioners*, 56 Minn. 513, 58 N. W. Rep. 295.

<sup>8</sup> *Rice v. Ruddiman*, 10 Mich. 125.

<sup>9</sup> *Delaplaine v. C. & N. W. Ry.*

*Co.*, 42 Wis. 214, 225; *Barney v. Keokuk*, 94 U. S. 324, 338; *Pollard's Lessee v. Hogan*, 3 How. 212; *Hardin v. Jordan*, 140 U. S. 371, 382, 383; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349.

<sup>10</sup> *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718; *Illinois Central R. R. Co. v. Illi-*

and ponds so small as to be wholly private.<sup>11</sup> Between the two extremes the cases are conflicting. It is not the province of this treatise to resolve this question of title, or of what waters are public and what private. But as it is agreed on all hands that the test of the ebb and flow of the tide must be abandoned in this country, it is manifest that some other test must be sought.<sup>12</sup> To say that the five or six great lakes are public and all the others private is purely arbitrary.<sup>13</sup> There would seem to be no reasonable criterion to be applied but that of navigability in fact.<sup>14</sup> This is said by the Supreme Court of the United States to be the real reason of the common law rule which makes the ebb and flow of the tides the test of public ownership.<sup>15</sup> If this test

nois, 146 U. S. 387, 31 S. C. Rep. 110; Ante note 3.

<sup>11</sup> "In respect to title the law divides natural fresh water ponds into two classes,—the small, which pass by an ordinary grant of land, like brooks and rivers, from which, as conveyable property, they are not distinguished; and the large, which are exempt from the operation of such a grant, for reasons that stop private ownership at the water's edge of the sea and its estuaries." *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718, 719.

<sup>12</sup> In the case last cited, referring to lakes and ponds, it is said: "The standard of size, or other test, that establishes their public or private title, is a point left undecided by our reported cases. But the law, classing large ponds with tide waters, and small ponds with fresh waters and brooks, necessarily provides a mode of determining to which class every pond belongs." *Concord Mfg. Co. v. Robertson*, 66

N. H. 1, 25 Atl. Rep. 718, 720. But the court does not make it clear what this mode is and later in the opinion indicates that the question may have to be determined arbitrarily. "The abandonment of the arbitrary tidal test makes it necessary to choose another, and it may be impossible to find one that is not arbitrary." *Ibid.* 25 Atl. Rep. p. 731.

<sup>13</sup> "Nothing can be more arbitrary than six exceptions to the English rule" (meaning the exception of the six great lakes). *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718, 731.

<sup>14</sup> *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139.

<sup>15</sup> "So, also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used

is adopted, then the only question which remains is to define what is meant by navigability and, upon this point, the position of the Supreme Court of Minnesota, that any water which is navigable for either profit or pleasure is within the rule, seems a reasonable one.<sup>16</sup> In the larger sense the reason for declaring any waters public, is thereby the better to preserve them for the public use and benefit, and if beneficial use by the public is taken as the test, then any waters are public which are capable of such beneficial use, whether for pecuniary gain or for health and pleasure.<sup>17</sup>

**§ 76a. What constitutes navigability.**—As the question of title to land under water depends largely, if not wholly, upon the question of navigability, we refer briefly to some authorities upon that question. Many of the cases affirm or imply that a stream or lake, in order to be navigable in the legal sense, must be navigable for some useful purpose connected with trade or agriculture. Thus in a Florida case it is said: "A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability, and is a public highway, open to all persons for the business of floatage to which it is adapted, whatever the character of the product, or the kind of floatage suited to their conditions;

as synonymous terms in England." *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 436, 13 S. C. Rep. 110.

<sup>16</sup> "Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are

used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit." *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139, 1143.

<sup>17</sup> See *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 436, 13 S. C. Rep. 110; *New England T. & S. Club v. Mather*, 68 Vt. 338, 35 Atl. Rep. 323.

though it may not be adapted to the use of vessels, and only fit for floating logs and rafts, yet if required for such use, and there is sufficient business, present or prospective, to render the easement a matter of public concern, it will be regarded as a public stream for that purpose; and it is not essential to the easement that the stream should be continuously, at all seasons of the year, in a state suited to such floatage."<sup>18</sup> So in a Massachusetts case it is said that, in order that a stream may have the character of navigability in law, "it must be navigable to some purpose, useful to trade or agriculture."<sup>19</sup> But more recent cases are to the effect that it is the capacity of being navigated, and not the purpose of the navigation, which determines the question of navigability in law.<sup>20</sup> The Massachusetts court, referring to the language already quoted from that State, says: "But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it this character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. Certainly fishing and fowling are as really regarded, on navigable waters, as trade and agriculture, though not mentioned in the case cited above; and in *West Roxbury v. Stoddard*, 7 Allen, 158, 171, it is said that the use of great ponds, which are public property, may as well be for bath-

<sup>18</sup> *Buckl v. Cone*, 25 Fla. 1, 6 So. Rep. 160.

<sup>19</sup> *Rowe v. Granite Bridge Corp.*, 21 Pick. 344. To the same effect: *Charlestown v. County Comrs.*, 3 Met. 202; *Murdock v. Stickney*, 8 Cush. 113, 115; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. Rep. 250; *Haine v. Hall*, 17 Or. 165, 20 Or. 165, 20 Pac. Rep. 831; *Brown v. Chadbourne*, 31 Me. 9; *East Hoquiam B. & L. Co. v. Neeson*, 20 Wash. 142, 64 Pac. Rep. 1001.

<sup>20</sup> *Attorney General v. Woods*, 108 Mass. 436; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139; *Falls Mfg. Co. v. Oconto Riv. Imp. Co.*, 87 Wis. 134, 58 N. W. Rep. 257; *Heyward v. Farmers' Min. Co.*, 42 S. C. 133, 19 S. E. Rep. 963; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718; *Clark v. Cambridge*, 45 Neb. 799, 64 N. E. Rep. 239; *Chisolm v. Caines*, 67 Fed. Rep. 285.

ing, boating, skating, fishing and fowling, as for business, and is entitled to equal consideration. If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation."<sup>21</sup>

§ 76b. The question of title to the bed of navigable waters and of the rights of riparian owners upon such waters is one of State policy and State law.—It has been repeatedly held by the Supreme Court of the United States that it is for each State to determine whether the title to the bed of navigable waters is in the State or in the riparian owner, and to what extent the prerogative of the State shall be exerted over such waters and the lands under them.<sup>22</sup> And so it is held, by the same high authority, that each State may determine for itself what rights, if any, attach to the ownership of lands adjacent to such waters.<sup>23</sup> Upon these questions the Federal Courts follow the decisions of the State Courts.<sup>24</sup>

§ 76c. Nature and limitations of the title to the bed of navigable waters, whether in the public or riparian owners.—The nature of the public title to the bed of navigable waters received very careful consideration at the hands of the Supreme Court of the United States, in the recent case

<sup>21</sup> To same effect is *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139.

<sup>22</sup> *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.*, 168 U. S. 349; *Hardin v. Jordan*, 140 U. S. 371, 382, 11 S. C. Rep. 808; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 13 S. C. Rep. 110; *Shively v. Bowlby*, 152 U. S. 1, 40, 14 S. C. Rep. 548; *Packer v. Bird*, 137 U. S. 661; *Barney v. Keokuk*, 94 U. S. 324. See also *Webb v. City of Demopolis*, 95 Ala. 116, 13 So. Rep. 289; *Web-*

*ber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. Rep. 469; *Chisolm v. Caines*, 67 Fed. Rep. 285. But the determination of this question by the federal courts does not always appear to be in harmony with the decisions of the State courts. Compare *Hardin v. Jordan*, 140 U. S. 371, 11 S. C. Rep. 833, and *Trustees of Schools v. Schroll*, 120 Ills. 509.

<sup>23</sup> Same.

<sup>24</sup> *Shively v. Bowlby*, 152 U. S. 1, 14 S. C. Rep. 548.

of *Illinois Central R. R. Co. v. Illinois*.<sup>25</sup> The legislature of the State had assumed to grant to the railroad company a thousand acres of the submerged lands of Lake Michigan adjacent to the shore in the city of Chicago. The grant extended for a considerable distance along the shore and embraced both shoal and deep water. The court held that the grant was revocable, if not absolutely void, and discussed at length the nature of the State's title to such lands. The title of the State is held to be in trust for the people at large, for the purposes of navigation and fishing.<sup>26</sup> Numerous other cases assert the trust character of the public title to the bed of navigable waters, and that the trust is for the benefit of the whole people and to aid in preserving and promoting the public rights of navigation and fishing.<sup>27</sup> All navigable streams and bodies of water have more or less shoal water along the shores which is not navigable. A distinction may, doubtless, be made between the soil under shoal water and the soil under deep water. The former may be reclaimed and devoted to private uses without detriment to the public interests. It may be otherwise with the latter. Just what are the limitations upon the power of the State over lands under public waters, is not definitely settled, beyond the fact that it is subject to the paramount authority of Congress to regulate interstate

<sup>25</sup> 146 U. S. 387, 13 S. C. Rep. 110.

<sup>26</sup> *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 452-454, 455, 456.

<sup>27</sup> *Martin v. Waddell*, 16 Pet. 367; *Den v. Jersey Co.*, 15 How. 426; *Shively v. Bowlby*, 152 U. S. 1, 14 S. C. Rep. 548; *Chisolm v. Caines*, 67 Fed. Rep. 285; *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. Rep. 640; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139; *Saunders v. New York Central R. Co.*, 144 N. Y.

75, 38 N. E. Rep. 992; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 19 S. E. Rep. 963; *Scranton v. Wheeler*, 57 Fed. Rep. 803, 6 C. C. A. 585; *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561; *Revell v. People*, 177 Ill. 468, 52 N. E. Rep. 1052. As to the power of the legislature over the public rights of navigation and fishing see also *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263, 19 N. E. Rep. 800; *State v. Elk Island Boom Co.*, 41 W. Va. 796, 24 S. E. Rep. 590.



and foreign commerce and to control navigable waters and the soil thereunder in the interest of such commerce.<sup>28</sup>

In those States in which the title to the bed of non-tidal navigable waters is held to be in the riparian owners, the private right is subject to the public rights of navigation and fishing and to the control of the State in the interest of such public rights.<sup>29</sup> The State may use the submerged lands for the improvement of navigation or promotion of commerce. Subject to such use and control the riparian owner may make any use of the submerged lands which does not materially interfere with the rights of the public.<sup>30</sup>

§ 77. *Rights of riparian owners on public waters.*—There is not more diversity of opinion among the courts as to the title to the bed and shores of navigable streams and waters than there is as to the rights of riparian owners in such waters as are conceded to be entirely *publici juris*. The older, and perhaps more numerous, authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public do not.<sup>31</sup> The stream is regarded as an adjoining freehold, the title to which is absolutely in the public, and which the public may use and control in the same manner as an individual could if the stream was his private property. Access to and use of the stream by the riparian owner is regarded as merely permissive on the part of the public and liable to be cut off ab-

<sup>28</sup> *Gibson v. United States*, 166 U. S. 269, 17 S. C. Rep. 578.

<sup>29</sup> *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. Rep. 469; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *City of Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. Rep. 661, 5 Am. R. & Corp. Rep. 490; *Attorney*

*General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 1; S. C. affirmed, 27 N. J. Eq. 631; *Scranton v. Wheeler*, 57 Fed. Rep. 803, 6 C. C. A. 585; *Clark v. Irrigation Co.*, 45 Neb. 799, 64 N. W. Rep. 239.

<sup>30</sup> Same.

<sup>31</sup> This was written in 1888.

solutely if the public see fit to do so.<sup>32</sup> Wood, in his work

<sup>32</sup> The leading cases in support of this doctrine are *Stevens v. Patterson etc.* R. R. Co., 34 N. J. L. 532, 1870, and *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522, 1852 (overruled in 1892, see § 79). Other cases in which the same doctrine is held are, *Pennsylvania R. R. Co. v. New York etc. R. R. Co.*, 23 N. J. Eq. 157 (opinion of Chancellor only); *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247 (opinion of Chancellor only); *Gould v. Hudson River R. R. Co.*, 12 Barb. 616; *Matter of Water Commissioners*, 3 Edwards Ch. 290; *Getty v. Hudson River R. R. Co.*, 21 Barb. 617; *Tomlin v. Dubuque, B. & M. R. R. Co.*, 32 Ia. 106 (Beck, J., dissents); *Canal Commissioners v. People*, 5 Wend. 423; S. C. 13 Wend. 355; 17 Wend. 570; *People v. Canal Appraisers*, 33 N. Y. 461; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *McKeen v. Delaware Canal Co.*, 49 Pa. St. 424; *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. 605; *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27; *Thayer v. New Bedford R. R. Co.*, 125 Mass. 253; *Matter of N. Y., W. S. & B. Ry. Co.*, 29 Hun 269. See also *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, which states and applies the law of New Jersey. Since the first edition was published, this view of the law has received its chief support, from the States of Oregon and Washington. In *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. Rep. 539, which is the leading author-

ity in the latter State, the court says: "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good. If the State cannot exercise its constitutional right to erect wharves and other structures without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess,—a proposition to which we cannot assent. See *Galveston v. Menard*, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the State, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the State or its grantees of wharves, upon shores of navigable waters, would constitute either a taking or damaging of private property for public use, in contemplation of the constitution." (Stiles, J., dissents.) See also *State ex rel. Yesler v. Prosser*, 2 Wash. 530, 27 Pac. Rep. 550; *Stinson Mill Co. v. Board of Harbor Line Comrs.* (Wash.), 29 Pac. Rep. 938; *State ex rel. v. Prosser*, 4 Wash. 816, 30 Pac. Rep. 734; *Columbia etc. R. R. Co. v. City of Seattle*, 6 Wash. 332, 33 Pac. Rep. 824, 34 Pac.

on Nuisances, states the doctrine as follows: "The State is the owner, absolutely, of the alveus of the stream to high-water mark, and, as such owner, may devote the stream, or any part thereof, to such purposes as it sees fit, so long as it does not materially obstruct navigation. Riparian owners, as such, upon this class of streams, have no more rights than any other member of the public, either in the stream, or any of the lands covered thereby. They cannot erect a wharf thereon, or use any portion of the alveus of the stream for any purpose whatever, except in the exercise of the common right of navigation. They may cross and recross the same for the purpose of approaching the sea, and so may any other member of the public. They may use the waters of the stream for ordinary domestic purposes, and so may any one else. The owner of the bank has no *jus privatum*, or special usufructuary interest, in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the water more readily, and over lands which the general public have no right to use for that purpose. But this is a mere

Rep. 725; *City of Seattle v. Columbia etc. R. R. Co.*, 6 Wash. 379, 33 Pac. Rep. 1048; *Seattle & M. R. R. Co. v. State*, 7 Wash. 150, 34 Pac. Rep. 551; *Yesler v. Washington Harbor Line Comrs.*, 146 U. S. 646, 13 S. C. Rep. 190; *Prosser v. Northern Pac. R. R. Co.*, 152 U. S. 59, 14 S. C. Rep. 528. The same rule is held in *Oregon. Bowlby v. Shively*, 22 Or. 410; S. C. 152 U. S. 1; *Hinman v. Warren*, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435; *Parker v. Rogers*, 8 Or. 183; *Shively v. Parker*, 9 Or. 500; *McCann v.*

*Oregon R. R. Co.*, 13 Or. 455; *Shively v. Welch*, 10 Sawyer 136, 140, 141. Compare *Parker v. West Coast Packing Co.*, 17 Or. 510, 21 Pac. Rep. 822. But it has been held that where a wharf has been built out to navigable water by the express or implied license of the State, it cannot be appropriated to public use without compensation. *Lewis v. City of Portland*, 25 Or. 133, 35 Pac. Rep. 256. And see *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

convenience, arising from his ownership of the lands adjacent to the ordinary high-water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum absque injuria*.”<sup>83</sup>

§ 78. *The same continued.*—On the other hand, there are cases which hold that the riparian owners, upon waters the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. This seems to us the better and sounder rule. The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the State, or the public. It is assumed that this title gives the State the same absolute and exclusive control of the waters and their bed, as an individual possesses over his private property. But there is really no analogy between the relations of a riparian owner to the waters upon which he abuts and the relations between the proprietors of adjoining lands. The State holds the title to public waters as a trustee, merely, for the use of all the public in common. The very object of declaring the title in the public is the better to secure this common use and benefit.<sup>84</sup> The riparian owner is pe-

<sup>83</sup> Wood on Nuisances (1st ed.), 592. See further on the subject: *Payne v. English*, 79 Cal. 540, 21 Pac. Rep. 952; *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. Rep. 421; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; *Henry v. Newburyport*, 149 Mass. 582, 22 N. E. Rep. 75; *Mehrhof Bros. Brick Mfg. Co. v. Delaware etc. R. R. Co.*, 51 N. J. L. 56, 16 Atl. Rep. 12; *Easton & A. R. R. Co. v. Central R. R. Co.*, 52 N. J. L. 267, 19 Atl. Rep. 722; *State v. Wright*, 54 N. J. L. 130, 23 Atl.

Rep. 116; *New Jersey Zinc Co. v. Morris C. & B. Co.*, 44 N. J. Eq. 398, 15 Atl. Rep. 227; *Fulmer v. Williams*, 122 Pa. St. 191, 15 Atl. Rep. 726; *Williams v. Fulmer*, 151 Pa. St. 405, 25 Atl. Rep. 103; Wood on Nuisances (1st ed.), 592. Stiles, J., in *Elisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. Rep. 539, 551, says that Mr. Wood is the only modern text writer who maintains this ground.

<sup>84</sup> *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 452, 453,

culiarly situated for the enjoyment of these advantages. He has rights in the waters upon which he abuts which no private owner has in the land of his neighbor. No private owner holds his lands for the purpose of being used by his neighbors and the public. The conclusions, therefore, which are based upon the artificial and purely metaphysical notion of title, carried to its extremist logical consequences, as in the case of ordinary private ownership, are, it seems to us, unsound and unwarranted. As matter of fact, riparian owners have always enjoyed, in connection with their estates, various privileges in the contiguous shore and waters, and, practically, these privileges have been regarded as annexed to their estates and estimated as part of the property in business transactions touching the value of the same. When a court is called upon to say whether these privileges are rights appurtenant to the property and part and parcel of it, it must establish a rule of law and of property, whichever way it decides the question. To look simply to the fact of title and then apply the law relating to adjoining proprietors, is to ignore some of the most important features in the case. True, the title is in the State, but it is only in the State by the declaration of courts, and then only as trustee for the benefit of all the public in common, including the riparian owners. And, looking further, it is seen that the riparian owner, in addition to rights which he shares in common with others, has other rights or privileges which are peculiar to himself, such as the right to accretions, the right of wharfage, the

455, 456, 457, 13 S. C. Rep. 110; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718, 721, 724, 725; ante § 76c. In the first case cited, speaking of this title, the court says: "But it is a title different in character from that which the State holds in lands intended for sale. It is different

from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties," p. 452.

right of access to and from his lot, and the like, which destroy all analogy to the case of adjoining proprietors. It is more reasonable, more logical and more just to say that these privileges are in fact rights, as inviolable as the soil itself. The public loses nothing, for it is conceded that all these rights are subject to the paramount right of the State to use and improve the waters as shall best subserve the common rights of all.<sup>35</sup>

§ 79. **The same continued.**—These views are not without a strong support in the earlier cases and cases already cited, and have been vindicated by several late decisions by courts of the highest authority. In *Gould v. Hudson River Railroad Co.*,<sup>36</sup> Judge Edmonds filed an elaborate dissenting opinion, in which he combated the conclusions of the majority with great learning and ability. He enumerates eight rights which the riparian owner has, that are peculiar to himself and appurtenant to his property: 1. The right of navigating the river to and from his land, and landing upon his shore. 2. The right, under the statute, to be preferred in the grant of a ferry right terminating upon his land and in a grant of the soil under water opposite his land. 3. The right of fishing in the river and of using his land in connection therewith. 4. The right to accretions. 5. The right to use the water in his business, whatever it may be, and for domestic purposes. 6. The right to lade and unlade upon the bank. 7. The right of way from his land to the channel of the river. 8. The right to be and remain a riparian owner, and have the water lave his land. And so in the case of *Stevens v. Paterson & Newark R. R. Co.*,<sup>37</sup> two of the Judges unite with the Chancellor in a dissenting opinion in which similar views are maintained. Says the Chancellor: "The right, on the principles of the common law, which I for convenience call the right of adjacency, consists in the right of ferriage, of landing boats alongside a wharf, or land by the shore, and unloading goods upon or taking them from it, the right of fishing from the shore, and drawing nets upon it, of entering upon it from the land,

<sup>35</sup> Ante § 76c.

<sup>36</sup> 6 N. Y. 522.

<sup>37</sup> 34 N. J. L. 532, 562.

for bathing or procuring water, and such other benefits as can be enjoyed only by the adjoining owner, peculiar to him, and not common to the rest of the public." And he concludes as follows:

"The conclusions to which I have arrived are these:

"First. That the owner of lands upon tide waters has a right to the natural advantages conferred on his land by its adjacency to the water, which, like the right to have fresh water streams flow unobstructed and unpolluted upon and from his land, and like the right to support for the natural soil from the adjacent soil, is an incident to the land, and is property.

"Second. That, by the law of New Jersey, being the common law as adopted here, altered to suit the circumstances and necessities of the people and the genius of our government, the right to wharf out from the lands situate on tide waters over the shore in front, has become an incident to such lands and a right of property.

"Third. That, by the wharf act of 1851, the right to fill in and appropriate the shore is conferred upon the shore owner as an incident to his property.

"Lastly. That all these rights, being incidents to an estate which add to its value, are property, and cannot be taken away by general or special legislation, except by the power of eminent domain for public use and upon compensation."<sup>38</sup>

Since the first edition was published the case of *Gould v. Hudson River R. R. Co.* has been overruled and the law of New York declared to be in accordance with the dissenting opinion of Judge Edmonds.<sup>39</sup>

<sup>38</sup> Judge Cooley, in his work upon *Constitutional Limitations* (p. 544), speaking of these cases, says: "So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without

compensation; for, even those courts which hold the fee in the soil under navigable streams to be in the State, admit valuable riparian rights in the adjacent proprietor."

<sup>39</sup> *Rumsey v. New York & N. E. R. R. Co.*, 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. R. & Corp.

§ 80. The same continued.—The same doctrine is affirmed in a recent case in the Supreme Court of the United States which went up from Wisconsin. The plaintiff had extended a wharf into the Milwaukee River. Afterwards the city of Milwaukee, acting under certain legislative acts, established dock lines upon the river, and declared a part of plaintiff's wharf which projected beyond these lines a nuisance and ordered its abatement. The plaintiff filed his bill to enjoin and prevailed. The court say that, though the title to the bed of the river is in the public, yet the abutting owner has riparian rights, and "among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. \* \* \* This riparian right," say the court, "is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the

Rep. 67. For other litigation between the same parties and growing out of the same facts, see: *Rumsey v. New York & N. E. R. R. Co.*, 114 N. Y. 423, 21 N. E. Rep. 1066; *Rumsey v. New York & N. E. R. R. Co.*, 125 N. Y. 681, 25 N. E. Rep. 1080; *Rumsey v. New York & N. E. R. R. Co.*, 130 N. Y. 88, 28 N. E. Rep. 763; *Rumsey v. New York & N. E. R. R. Co.*, 136 N. Y. 543, 32 N. E. Rep. 979. The following are other New York cases bearing on the question: *Steers v. City of Brooklyn*, 101 N. Y. 51; *Williams v. New York*, 105 N. Y. 419; *New York Cent. etc. R. R. Co. v.*

*Aldridge*, 135 N. Y. 83, 32 N. E. Rep. 50; *People ex rel. etc. v. Comrs. of Land Office*, 135 N. Y. 447, 32 N. E. Rep. 139; *Saunders v. New York Cent. etc. R. R. Co.*, 144 N. Y. 75, 38 N. E. Rep. 992; *Saunders v. New York Cent. etc. R. R. Co.*, 71 Hun, 153, 23 N. Y. Supp. 927; *Nolan v. Brockway Park Imp. Co.*, 76 Hun, 458, 28 N. Y. Supp. 102; *Hedges v. West Shore R. R. Co.*, 80 Hun, 310, 30 N. Y. Supp. 92; *Babcock v. City of Buffalo*, 1 Sheldon, 317; *Sage v. New York*, 154 N. Y. 61; *Archibald v. New York Central etc. R. R. Co.*, 157 N. Y. 574, 52 N. E. Rep. 567; *People v. Mould*, 37



public good, upon due compensation."<sup>40</sup> These views have been confirmed by recent decisions of the same court.<sup>41</sup>

§ 81. The same continued.—Several well considered cases upon this question are to be found in the 42d volume of the Wisconsin Reports. In one of these cases it appeared that one Diedrich owned a lot on Lake Michigan and had, by artificial means, extended his lot some eighty-five feet into the lake. A railroad company located its road across this new land, and instituted proceedings to condemn so much of the land as was required for its track. On appeal the court held that Diedrich had no title to the made land on which the railroad was laid, and that, as the damages awarded had been given for the land taken, and not for injury to riparian rights, the case must be reversed. The question of riparian rights was discussed and the opinion expressed that, for any injury thereto, the owner would be entitled to compensation.<sup>42</sup>

In another case<sup>43</sup> a railroad company constructed its road across a small lake in the city of Madison so as entirely to cut off the plaintiff from access to the lake and leave a stagnant pool in front of his premises. The lake was navigable and about nine miles in circumference. The plaintiff sued for damages. The title to the bed of the lake beyond the water's edge was held to be in the State, but

App. Div. 35. In *Saunders v. New York Cent. etc. R. R. Co.*, 144 N. Y. 75, 38 N. E. Rep. 992, the court, in speaking of the rights of riparian owners says: "What these rights are has been decided in the *Rumsey* case, 133 N. Y. 79, 30 N. E. 654, and since that decision reaffirmed in the case of *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, 13 S. C. Rep. 110. They embrace the right of access to the channel or navigable part of the river for navigation, fishing, and such other uses as commonly belong to riparian ownership, the right

to make a landing, wharf or pier for his own use or for that of the public, with the right of passage to and from the same with reasonable safety and convenience."

<sup>40</sup> *Yates v. Milwaukee*, 10 Wall. 497, 504. To the same effect, *Chicago v. Laflin*, 49 Ills. 172.

<sup>41</sup> *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 13 S. C. Rep. 110; *Shively v. Bowlby*, 152 U. S. 1, 14 S. C. Rep. 548.

<sup>42</sup> *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248.

<sup>43</sup> *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214, 226.

the court held the plaintiff had riparian rights appurtenant to his land of which he could not be deprived without compensation. The court say: "But, while the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land, out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they oftentimes give property thus situated its chief value. It is evident, from the nature of the case, that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark, that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may and do exist, though the fee in the bed of the river or lake be in the State. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact."<sup>44</sup>

<sup>44</sup> The same questions of right are discussed in the following cases, which, however, do not involve any exercise of the eminent domain power: *Olson v. Merrill*, 42 Wis. 203; *Boorman v. Sunnuchs*, 42 Wis. 233. See also

*Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297, 48 N. W. Rep. 371; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128; *Prieve v. Wisconsin State Land & Imp. Co.* (Wis.), 67 N. W. Rep. 918.

The same views are entertained by the Supreme Court of Minnesota, which, in a recent case, says: "In this State it is the settled doctrine that the riparian owner has the fee to low water mark. But, while he only has the fee to low water mark, he has certain rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and, to this extent, exclusively to occupy for such and like purposes, the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights are property, and cannot be taken away without paying just compensation therefor."<sup>45</sup>

Since the former edition various other States have rendered decisions in conformity with these views.<sup>46</sup>

§ 82. *The same continued.*—These views are fully sustained by a decision of the House of Lords, in the late case of *Lyon v. Fishmongers Co.*<sup>47</sup> The question was, whether a riparian proprietor on the banks of a tidal navigable river had any rights or natural easements similar to those which belong to a riparian proprietor upon a non-tidal stream. This question was answered in the affirmative. "I cannot entertain any doubt," says the Lord Chancellor, "that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner,

<sup>45</sup> *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297, 301. See also *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139; *Bradshaw v. Duluth Imperial Mill Co.*, 52 Minn. 59, 53 N. W. Rep. 1066; *Rippe v. Chicago etc. R. R. Co.*, 23 Minn. 18.

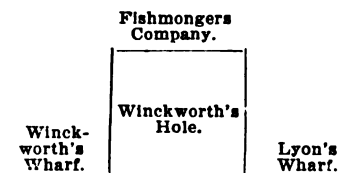
<sup>46</sup> *Prior v. Swartz*, 62 Conn. 132, 25 Atl. Rep. 398; *Bond v.*

*Wool*, 107 N. C. 139, 12 S. E. Rep. 281; *Wool v. Town of Edenton*, 115 N. C. 10, 20 S. E. Rep. 165; *Sherman v. Sherman*, 18 R. I. 504, 30 Atl. Rep. 459; *Organ v. Memphis & L. R. R. Co.*, 51 Ark. 235, 11 S. W. Rep. 96.

<sup>47</sup> *Law Reports*, 1 Appeal Cases, 662, 674, 682; 1876.

underlying and controlled by, but not extinguished by, the public right of navigation." And from Lord Selborne's opinion we take the following: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and, if there is any sound principle on which it ought to be made, the burden of proof seems to lie on those who so affirm. As for the public right of navigation, it may well co-exist with private riparian rights, which must of course be enjoyed subject to it; just as where there is no navigation, each riparian proprietor's right is concurrent with, and is so far limited by, the rights of other proprietors. With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights, properly so called, because the word 'riparian' is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law."<sup>48</sup>

<sup>48</sup> In this case the facts were as follows: Lyon owned a wharf which fronted south on the Thames and west on an inlet extending north about forty feet, known as Winckworth's Hole, at the bottom of which was the defendant company's wharf, and west of the inlet was Winckworth's wharf, thus:—



By an act of parliament, a body called the Conservators of the Thames was constituted, with

This case may safely be regarded as settling the law of England in favor of the conclusions reached in the text. Further confirmation of the text will be found in the cases cited in the note and in the following sections.<sup>49</sup>

power to grant to the owner or occupier of any land fronting and immediately adjoining the Thames a license to make any dock or other work immediately in front of his land and into the body of said river, but not so as to take away, alter or abridge any right to which any owner or occupier of lands on the banks of the river, including the banks thereof, was by law entitled. The defendants obtained a license to extend their wharf to the main line of the river, so as entirely to displace the water in Winckworth's Hole and cut off the plaintiff from access to his premises on the west side thereof. The plaintiff applied for an injunction, which was granted by the Vice Chancellor. On appeal, the decision of the Vice Chancellor was reversed, on the ground that the plaintiff had no right or claim which would be taken away, altered or abridged by the execution of the projected improvement. (Law Rep., 10 Ch. App. 679.) The broad ground was taken that a riparian owner on tidal waters has no private right in the waters appurtenant to his land. The latter decision was reversed by the House of Lords without a dissenting opinion. See also *Bill v. Quebec*, 1 L. R. 5 H. L. 84; *North Shore R. R. Co. v. Plon*, 14 App. Cas. 612, affirming *S. C.* 14 Duvall, 677; *Bigaouette v. North Shore R. R. Co.*, 17 Duvall, 363.

<sup>49</sup> The authorities sustaining these views are here collated, for convenience of examination and comparison with the cases supporting the opposite view, to be found in note 32, § 77; *Yates v. Milwaukee*, 10 Wall. 497; *Dela-  
plaine v. C. & N. W. Ry. Co.*, 42 Wis. 214; *Boorman v. Sun-  
nucks*, id. 233; *Diedrich v. N. W.  
Union Ry. Co.* id. 248; *Lyon  
v. Fishmongers' Company*, L. R. 1 App. Cas. 662; *Duke of Buccleuch v. Metropolitan Board of  
Works*, L. R. 5 H. L. 418; *Mine-  
v. Gilmour*, 12 Moore P. C. 131; *Rose v. Groves*, 5 M. & G. 613; *Attorney General v. Conservator  
of the Thames*, 1 H. & M. 1; *Gough v. Bell*, 2 Zab. 441; *Bell  
v. Slack*, 2 Whart. Pa. 538; *Carli  
v. Stillwater Street R. & T. Co.*, 28 Minn. 373; *Brisbane v. St. Paul  
& Sioux City R. R. Co.*, 23 Minn. 114; *Union Depot etc. Co., v.  
Brunswick*, 31 Minn. 297; *Gari-  
tee v. Mayor etc. of Baltimore*, 52 Md. 422; *Baltimore & Ohio R.  
R. Co. v. Chase*, 43 Md. 23; *Myers  
v. St. Louis*, 82 Mo. 367; *Wilson  
v. Welch*, 12 Or. 353; *Dutton v.  
Strong*, 1 Black, 23; *Langdon v.  
Mayor etc. of New York*, 93 N. Y. 129; *Renwick v. D. & N. W. Ry.  
Co.*, 49 Ia. 664; affirmed, 102 U. S. 180; *Prior v. Swartz*, 63 Conn. 132, 25 Atl. Rep. 398; *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435; *State v. Black River  
Phosphate Co.*, 32 Fla. 82, 13 So. Rep. 640; *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139;

§ 83. **The same concluded.**—In conclusion, the following rights may be enumerated as appurtenant to property upon public waters:

First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.<sup>50</sup>

Second. The right of access to the water, including a right of way to and from the navigable part.<sup>51</sup>

Rippe v. Chicago etc. R. R. Co., 23 Minn. 18; Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. R. & Corp. Rep. 67; Saunders v. New York Central etc. R. R. Co., 144 N. Y. 75, 38 N. E. Rep. 992; Steers v. City of Brooklyn, 101 N. Y. 51; Williams v. New York, 105 N. Y. 419; Hedges v. West Shore R. R. Co., 80 Hun, 310, 30 N. Y. Supp. 92; Babcock v. City of Buffalo, 1 Sheldon, 317; Gregory v. Forbes, 96 N. C. 77; Bond v. Wool, 107 N. C. 139, 12 S. E. Rep. 281; Wool v. Town of Edenton, 115 N. C. 10, 20 S. E. Rep. 165; Sherman v. Sherman, 18 R. I. 504, 30 Atl. Rep. 459; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. Rep. 128; Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. Rep. 371; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. Rep. 110; Paine Lumber Co. v. United States, 55 Fed. Rep. 854; Bill v. Quebec, L. R. 5 H. L. 84; North Shore R. R. Co. v. Pion, 14 App. Cas. 612; S. C. 14 Duvall, 677; Bigaquette v. North Shore R. R. Co., 17 Duvall, 363.

<sup>50</sup> Dissenting opinion, Stevens v. Patterson, 34 N. J. L. 532; opinion of Judge Edmonds, dis-

senting in Gould v. Hudson River R. R. Co. 6 N. Y. 522; Lyon v. Fishmongers Co., L. R. 1 App. Cas. 662; Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214; Rice v. Ruddiman, 10 Mich. 125, 142; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. Rep. 110; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. Rep. 726; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. Rep. 103.

<sup>51</sup> Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 35; Garitee v. Mayor etc. of Baltimore, 52 Md. 422; Carli v. Stillwater Street R. & T. Co., 28 Minn. 373; Brisbane v. St. Paul & Sioux City R. R. Co., 23 Minn. 114; cases cited in last note; Yates v. Milwaukee, 10 Wall. 497; Union Depot etc. Co. v. Brunswick, 31 Minn. 297; Shirley v. Bishop, 67 Cal. 543.

Williams v. New York, 105 N. Y. 419; Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. N. & Corp. Rep. 67; Saunders v. New York Cent. etc. R. R. Co., 144 N. Y. 75, 38 N. E. Rep. 992; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. Rep. 726; Sherman v. Sher-

Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the State.<sup>52</sup>

Fourth. The right to accretions or alluvium.<sup>53</sup>

man, 18 R. I. 504, 30 Atl. Rep. 459; Paine Lumber Co. v. United States, 55 Fed. Rep. 854; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. Rep. 110; North Shore R. R. Co. v. Pion, 14 App. Cas. 612; Pion v. North Shore R. R. Co., 14 Duvall, 677; Bigaquette v. North Shore R. R. Co., 17 Duvall, 363; Lewis v. Johnson, 76 Fed. Rep. 476. See Sage v. New York, 10 App. Div., 294, 41 N. Y. Supp. 938.

<sup>52</sup> Yates v. Milwaukee, 10 Wall. 497; Dutton v. Strong, 1 Black. 23; Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214; Gough v. Bell, 2 Zab. 441; Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 35; Garltee v. Mayor etc. of Baltimore, 52 Md. 422; East Haven v. Hemingway, 7 Conn. 186; State v. Sargent, 45 Conn. 358; Grant v. Davenport, 18 Ia. 179; Musser v. Hershey, 42 Ia. 356, 361; Sturs v. Brooklyn, 101 N. Y. 51; Carl v. Stillwater Street R. & T. Co., 28 Minn. 373, 380; Brisbane v. St. Paul & Sioux City R. R. Co., 23 Minn. 114; Union Depot etc. Co. v. Brunswick, 31 Minn. 297; see Ravenswood v. Flemings, 22 W. Va. 52; Gregory v. Forbes, 96 N. C. 77; Hart v. Mayor etc. of Baton Rouge, 10 La. An. 171.

Prior v. Swartz, 62 Conn. 132, 25 Atl. Rep. 398; City of Chicago v. Van Ingen, 152 Ill. 624, 38 N. E. Rep. 894; City of Grand Rapids v. Powers, 39 Mich. 94, 50 N. W. Rep. 661; Rippe v. Chica-

go etc. R. R. Co., 23 Minn. 18; Concord Mfg. Co. v. Robertson, 66 N. H. 1; 25 Atl. Rep. 718; Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. R. & Corp. Rep. 67; Saunders v. New York Cent. etc. R. R. Co., 144 N. Y. 75, 38 N. E. Rep. 992; Gregory v. Forbes, 96 N. C. 77; Bond v. Wool, 107 N. C. 139, 12 S. E. Rep. 281; City of Janesville v. Carpenter, 77 Wis. 238, 46 N. W. 128; Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 S. C. Rep. 110; Paine Lumber Co. v. United States, 55 Fed. Rep. 854; Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; Brooklyn v. Mackay, 13 App. Div. N. Y. 105. But this does not authorize the riparian owner to build out piers for the purpose of making new land, and such piers may be abated as a nuisance at the suit of the State. Revell v. People, 177 Ill. 468, 52 N. E. Rep. 1052; Gordon v. Winston, 181 Ill. 338.

<sup>53</sup> Girard's Lessee v. Hughes, 1 G. & J. 249; Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 35; Tomlin v. D. B. & M. R. R. Co., 32 Ia. 106, 109; Lockwood v. N. Y. & N. H. R. R. Co., 37 Conn. 387; Camden & Atlantic Land Co. v. Lippincott, 45 N. J. L. 405; Lamphrey v. State, 52 Minn. 181, 53 N. W. Rep. 1139; City of St. Louis v. Mo. Pac. R. R. Co., 114 Mo. 13, 21 S. W. Rep. 202; Banks Ogden, 2 Wall. 57.



Fifth. The right to make a reasonable use of the water as it flows past or laves the land.<sup>54</sup>

In addition to these rights, which are recognized by the common law, the riparian owner upon public waters is frequently invested with rights by statute.<sup>55</sup> All these rights are subordinate to the regulation and use of the waters by the public for navigation and fishing.

§ 84. Injury to riparian rights upon public waters is a taking.—According to principles heretofore laid down, it follows that any injury to riparian rights for public use is a taking for which compensation must be made.<sup>56</sup> “These riparian rights founded on the common law, are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be abridged or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation.”<sup>57</sup> The general proposition is sufficiently illustrated by the cases reviewed in the preceding sections.

§ 84a Interfering with access; railroads and other works below high-water mark.—The legislature cannot authorize the construction of a railroad between high and low water mark, or anywhere below the line of private ownership, without compensation to the riparian owner.<sup>58</sup>

<sup>54</sup> Opinion of Judge Edmonds in *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522.

<sup>55</sup> As to the right of the riparian owner to maintain a ferry, see *Braddock Ferry Co.'s Appeal*, 3 Penny. 32; *McRoberts v. Washburn*, 10 Minn. 23.

<sup>56</sup> See ante §§ 54-56, 70.

<sup>57</sup> *Baltimore & O. R. R. Co. v. Chase*, 43 Md. 23, 35. To same effect *Diedrich v. N. W. Union R. R. Co.*, 42 Wis. 248; *Kingsland v. New York*, 35 Hun, 458.

<sup>58</sup> *Carli v. Stillwater Street R.*

*& T. Co.*, 28 Minn. 373; *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214; *Diedrich v. N. W. Union Ry. Co.*, id. 248; *Railway Co. v. Renwick*, 102 U. S. 180; *S. C. 49 Ia. 664*; *Druxy v. Midland R. R. Co.*, 127 Mass. 571. In this case the court, without entering into any discussion of the matter, or of prior cases, hold that “the right of free access to tide waters is a right the obstruction of which is an element of damage.”



It is immaterial that a public highway intervenes between the plaintiff's lot and high water mark, if the fee is in the plaintiff.<sup>59</sup> Nor can a city, in making an improvement of the channel of a tidal river, deposit mud and debris in front of private property so as to cut off access to the channel.<sup>60</sup> In Massachusetts it is held that a riparian owner has no right to the ebb and flow of the tide over flats between high and low water mark, which belong in fee to another, and that a city, owning the fee of such flats, may fill them up and thus prevent the flow of the tide, to the riparian owner, without being liable to him in damages.<sup>61</sup> A navi-

*Rumsey v. New York & N. E. R. R. Co.*, 125 N. Y. 681, 25 N. E. Rep. 1080; *Rumsey v. New York & N. E. R. R. Co.*, 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. R. & Corp. Rep. 67; *Rumsey v. New York & N. E. R. R. Co.*, 136 N. Y. 543, 32 N. E. Rep. 979; *Saunders v. N. Y. Cent. etc. R. R. Co.*, 144 N. Y. 75, 38 N. E. Rep. 992; *Saunders v. New York Cent. etc. R. R. Co.*, 71 Hun, 153, 23 N. Y. Supp. 927; *Hedges v. West Shore R. R. Co.*, 80 Hun, 310, 30 N. Y. Supp. 92; *North Shore R. R. Co. v. Pion*, 14 App. Cas. 612, affirming *S. C. 14 Duvall*, 677; *Bigaouette v. North Shore R. R. Co.*, 17 Duvall, 363; and see *New York Cent. etc. R. R. Co. v. Aldridge*, 135 N. Y. 83, 32 N. E. Rep. 50; *Mehrhof Bros. Brick Mfg. Co. v. Delaware etc. R. R. Co.*, 51 N. J. L. 56, 16 Atl. Rep. 12.

Contra: *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522; *S. C. 12 Barb.* 616; *Getty v. Same*, 21 Barb. 617; *Pennsylvania R. R. Co. v. New York etc. R. R. Co.*, 23 N. J. Eq. 157; *Stevens v. Paterson etc. R. R. Co.*, 34 N. J. L. 532; *Tomlin v. D. B. & M. R. R. Co.*, 32 Ia. 106; *Boston & Wor-*

*cester R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. 605; *Thayer v. New Bedford R. R. Co.*, 125 Mass. 253; *Ormerod v. New York etc. R. R. Co.*, 13 Fed. Rep. 370; and see *Wood v. Chicago etc. R. R. Co.*, 60 Ia. 456; *Chicago etc. R. R. Co. v. Porter*, 72 Ia. 426; *Starnes v. Molson*, 1 Montreal L. Q. B. 425; *Widder v. Buffalo etc. R. R. Co.*, 20 U. C. Q. B. 638; *Regina v. Buffalo etc. R. R. Co.*, 23 U. C. Q. B. 203; *Widder v. Buffalo etc. R. R. Co.*, 24 U. C. Q. B. 222.

<sup>59</sup> *Brisblin v. St. Paul & Sioux City Ry. Co.*, 23 Minn. 114; *Chesapeake & Ohio Canal Co. v. Union Bank*, 5 Cranch, C. C. 509. But it is otherwise where the fee of the street is in the public. *Ellinger v. Mo. Pac. R. R. Co.*, 112 Mo. 525, 20 S. W. Rep. 800; *City of St. Louis v. Mo. Pac. R. R. Co.*, 114 Mo. 13, 21 S. W. Rep. 202.

<sup>60</sup> *Garitee v. Mayor etc. of Baltimore*, 52 Md. 422; see also *Langdon v. Mayor etc. of New York*, 93 N. Y. 129; *Butcher's Ice & Coal Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. Rep. 376.

<sup>61</sup> *Henry v. City of Newbury-*

gable slip adjacent to plaintiff's premises cannot be filled up, or obstructed, by a city, without compensation.<sup>62</sup> But as riparian rights are held to be subject to the public right, works for the improvement of navigation may be constructed, though access from private property to navigable water is thereby prevented or impaired.<sup>63</sup>

The right of the State, as the trustee for the public, of lands below high water mark, to grant a right of way over the same to a railroad corporation, is considered and sustained in *Saunders v. New York Central, etc., R. R. Co.*<sup>64</sup> Whether the grant or condemnation of a right of way below high water mark, or along the bank, takes absolutely the riparian rights, would doubtless depend upon whether a fee or an easement was required. In the former case there would probably be a complete taking of the riparian rights,<sup>65</sup> but in the latter a taking only to the extent of the impairment.<sup>66</sup>

It has been held that a proprietor upon a navigable stream cannot recover for any damages to his property by reason of an authorized dam or bridge across the river which prevents navigation between his premises and the general system of waters with which the stream connects.<sup>67</sup>

port, 149 Mass. 582, 22 N. E. Rep. 75.

<sup>62</sup> *Babcock v. City of Buffalo*, 1 Sheldon 317; *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. Rep. 934, 5 Am. R. R. & Corp. Rep. 176. Compare *Egan v. Hart*, 45 La. Ann. 1358, 14 So. Rep. 244; *Payne v. English*, 79 Cal. 540, 21 Pac. Rep. 952.

<sup>63</sup> *Sage v. New York*, 154 N. Y. 61; *Scranton v. Wheeler*, 57 Fed. Rep. 803, 6 C. C. A. 585; and see ante § 71.

<sup>64</sup> 144 N. Y. 75, 38 N. E. Rep. 992. See also *Chicago etc. R. R. Co. v. Porter*, 72 Ia. 426.

<sup>65</sup> *City of St. Louis v. Mo. Pac. R. R. Co.*, 114 Mo. 13, 21 S. W. Rep. 202; *Hanford v. St. Paul & D. R. R. Co.*, 43 Minn. 104, 44 N. W. Rep. 1144; *Ellinger v. Mo. Pac. R. R. Co.*, 112 Mo. 525, 20 S. W. Rep. 800.

<sup>66</sup> *New Jersey Zinc & I. Co. v. Morris*, 44 N. J. Eq. 398, 15 Atl. Rep. 227; *New York Central etc. R. R. Co. v. Aldridge*, 135 N. Y. 83, 32 N. E. Rep. 50; *Rumsey v. New York & N. E. R. R. Co.*, 125 N. Y. 681, 25 N. E. Rep. 1080; *Saunders v. New York Central etc. R. R. Co.*, 144 N. Y. 75, 38 N. E. Rep. 992.

<sup>67</sup> *Sugar Refining Co. v. Jersey*

So the construction of a bridge or highway across the mouth of a cove, which prevented those living on its shore from having access to the sea, was held not to be a taking of any property of such shore owners.<sup>68</sup> Building a bridge or dam across the mouth of a non-navigable bayou is held to give abutters on the bayou no cause of action, although it might be made navigable.<sup>69</sup> But a city cannot lay out a street across a navigable waterway or bayou so as to destroy the same for navigation.<sup>70</sup> In Ohio it has been held that authority to bridge a navigable stream, did not confer authority to construct a bridge without a draw.<sup>71</sup>

§ 84b. **Establishing harbor lines and interfering with piers and wharves.**—The establishing of harbor lines or dock lines is simply a regulation of the private right of building piers and wharves out to navigable water, in the interest of the public right of navigation and commerce. The establishment of such lines and prohibiting the building of piers and wharves beyond such lines, is not a taking of private property, and no compensation need be made to riparian owners on account thereof.<sup>72</sup> But existing piers,

City, 26 N. J. Eq. 247; Matter of Water Commissioners, 3 Edwards, Ch. 290; Parker v. Cutter Milldam Co., 20 Me. 253; Blackwell v. Old Colony R. R. Co., 122 Mass. 1; Lansing v. Smith, 8 Cow. 146; S. C. 4 Wend. 9; Dover v. Portsmouth Bridge, 17 N. H. 200. Compare Stofflet v. Estes, 104 Mich. 208, 62 N. W. Rep. 347. No recovery can be had for the temporary interruption of navigation while rebuilding a draw. Hamilton v. Vicksburg etc. R. R. Co., 119 U. S. 280; and see Willson v. Marsh Co., 2 Pet. 245; Farmers' Mfg. Co. v. Albemarle R. R. Co., 117 N. C. 579; 23 S. E. Rep. 213; Mehrhof Bros. Mfg. Co. v. Delaware etc. R. R. Co., 51 N. J. L. 56, 16 Atl. Rep. 12.

<sup>68</sup> O'Brien v. Norwich & Worcester Ry. Co., 17 Conn. 371; Clark v. Saybrook, 21 Conn. 313; see matter of New York, West Shore & Buffalo Ry. Co. 101 N. Y. 685; Ockerhausen v. Tyson, 71 Conn. 81, 40 Atl. Rep. 1041.

<sup>69</sup> Egan v. Hart, 45 La. Ann. 1358, 14 So. Rep. 244; St. Louis etc. R. R. Co. v. Schneider, 30 Mo. App. 620; Potter v. Indiana etc. R. R. Co., 95 Mich. 389, 54 N. W. Rep. 956. In the latter case it is said the plaintiff may recover if he shows special damage.

<sup>70</sup> Ligare v. City of Chicago, 139 Ill. 46, 28 N. E. Rep. 934, 5 Am. R. R. & Corp. Rep. 176.

<sup>71</sup> Hickok v. Hine, 23 Ohio st. 523.

<sup>72</sup> Sherman v. Sherman, 18

extending beyond the lines so established, cannot be taken or destroyed without compensation, unless they are an obstruction to navigation.<sup>73</sup> Merely establishing a harbor line, which cuts off a portion of plaintiff's wharf, is not a taking, when no attempt is made to remove it.<sup>74</sup> A pier which obstructs navigation is a public nuisance,<sup>75</sup> and the owner is not entitled to compensation if it is taken or impaired by works for the improvement of navigation.<sup>76</sup> Where the abutter owns the bed of a stream, a dock line cannot be established which prevents the erection of such structures in or over the water as do not interfere with the public use of the stream.<sup>77</sup> Nor can a dock line be established which at certain points passes across the natural bank of the river.<sup>78</sup> The right to collect wharfage fees cannot be taken without compensation.<sup>79</sup>

Those States which hold the doctrine of the absolute title of the public to public waters, of course, deny any redress

R. I. 504, 30 Atl. Rep. 459; *Harlan & H. Co. v. Paschall*, 5 Del. ch. 435; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Comrs.*, 18 Wall. 57; *Atlee v. Packet Co.*, 21 Wall. 389; *Yesler v. Wash. Harbor Line Comrs.*, 146 U. S. 646, 13 S. C. Rep. 190; *Prosser v. Northern Pac. R. R. Co.*, 152 U. S. 59, 14 S. C. Rep. 528; *Commonwealth v. Alger*, 7 Cush. 53; *City of Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. Rep. 661, 5 Am. R. R. & Corp. Rep. 490; *State v. Sargent*, 45 Conn. 358; *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561; *Eisenback v. Hatfield*, 2 Wash. 236, 26 Pac. Rep. 539; *State v. Prosser*, 2 Wash. 530, 27 Pac. Rep. 550; *Bowlby v. Shively*, 22 Or. 410, 30 Pac. Rep. 154; *Shively v. Bowlby*, 152 U. S. 1, 14 S. C. Rep. 548. The State may, of course, provide for compensation

in such cases, if it sees fit to do so. *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561.

<sup>73</sup> *Yates v. Milwaukee*, 10 Wall. 497; *City of Chicago v. Laflin*, 49 Ill. 172.

<sup>74</sup> *Prosser v. Northern Pac. R. R. Co.*, 152 U. S. 59, 14 S. C. Rep. 528; *Yesler v. Washington Harbor Line Comrs.*, 146 U. S. 646, 13 S. C. Rep. 190; *Paine Lumber Co. v. United States*, 55 Fed. Rep. 854.

<sup>75</sup> *Atlee v. Packet Co.*, 21 Wall. 389.

<sup>76</sup> *Paine Lumber Co. v. United States*, 55 Fed. Rep. 854.

<sup>77</sup> *City of Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. Rep. 661, 5 Am. R. R. & Corp. Rep. 490; and see *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128.

<sup>78</sup> Same.

<sup>79</sup> *Grant v. Davenport*, 18 Ia.

for injury to riparian rights, for the reason that they do not recognize the existence of such rights. It has accordingly been held in such States that the converting of a private wharf into a public one,<sup>80</sup> or the building of public wharves in front of private property, to be owned and controlled by the public, are things which may be done without compensation to the riparian owner.<sup>81</sup> But even in such States a wharf which has been built by express license from the State cannot be taken for public use, as for the pier of a bridge, without compensation.<sup>82</sup> The grant by the State of the right to plant oysters is subject to the right of the riparian owner to wharf out through such beds.<sup>83</sup>

§ 84c. Rights of riparian owners upon lakes and ponds and what interference therewith is a taking.—The rights of riparian owners upon lakes and ponds are the same as upon other waters.<sup>84</sup> Accordingly the abutting owners upon a lake or pond, whether the title to the bed is in the public or the abutters, have a right to have the water stand at its natural level,<sup>85</sup> and it follows that the waters cannot be raised or lowered or taken away without compensation.<sup>86</sup> The temporary raising of the water in a pond and flooding of plaintiff's land by a coffer dam in the outlet,

179; *Crocker v. New York*, 15 Fed. Rep. 405.

<sup>80</sup> *Hart v. Mayor etc. of Baton Rouge*, 10 La. Ann. 171; *Shepherd v. New Orleans*, 6 Rob. La. 349.

<sup>81</sup> *Ravenswood v. Fleming*, 22 W. Va. 52; *Payne v. English*, 79 Cal. 540, 21 Pac. Rep. 952.

<sup>82</sup> *Lewis v. City of Portland*, 25 Or. 133, 35 Pac. Rep. 256; and see *Classen v. Guano Co.*, 81 Md. 258, 31 Atl. Rep. 808.

<sup>83</sup> *Prior v. Swartz*, 62 Conn. 132, 25 Atl. Rep. 398.

<sup>84</sup> *Lamphrey v. State*, 52 Minn. 181, 53 N. W. Rep. 1139; and cases cited in § 76.

<sup>85</sup> *Cedar Lake Hotel Co. v. Ce-*

*dar Lake Hydraulic Co.*, 79 Wis. 297, 48 N. W. Rep. 371.

<sup>86</sup> *Clark v. Rockland Water Co.*, 52 Me. 68; *Fernold v. Knox Woolen Co.*, 82 Me. 48, 19 Atl. Rep. 93; *Troe v. Larson*, 84 Ia. 649, 51 N. W. Rep. 179; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. Rep. 718; *Peay v. Salt Lake City*, 11 Utah 331, 40 Pac. Rep. 206; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297, 48 N. W. Rep. 371; *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; ante § 73.

for the purpose of constructing a bridge, was held to be no actionable injury.<sup>87</sup>

§ 84d. **Withdrawing or diverting public waters.**—We have considered this question with reference to public rivers in a former section.<sup>88</sup> We have there endeavored to sustain the view that the right to the flow of the stream is the same, whether the bed is public or private property. The same principles which apply to public streams apply to public lakes and ponds, so far as the conditions make them applicable.<sup>89</sup> It would follow that the water of public lakes and ponds could not be withdrawn for public use, without compensation to the riparian owners. But some of the courts hold that the waters of a public stream or pond may be taken for public use, as to supply a city with water, or for a canal, without compensation to the riparian owner.<sup>90</sup> But in Massachusetts, where this doctrine prevails, it is held not to apply to the case of private ponds.<sup>91</sup>

§ 85. **Miscellaneous cases in regard to public waters.**—The plaintiff had land on an island in the Savannah River and also on the banks of the same, prepared for rice fields. There were canals by which the water could be let in at high tide and drained off at low tide, both operations being essential for rice. The government, for the purpose of improving the navigation of the river, built a dam, which raised the water so that the plaintiff could not drain his lands at low tide and thereby interfered with their use for raising rice and diminished their value. It was held

<sup>87</sup> *Atwater v. Village of Canandaigua*, 124 N. Y. 602, 27 N. E. Rep. 385, affirming S. C. 56 Hun, 293, 30 N. Y. Supp. 577.

<sup>88</sup> Ante § 73.

<sup>89</sup> See last section.

<sup>90</sup> *Fay v. Salem & D. Aqueduct Co.*, 111 Mass. 27; *Cole v. Eastham*, 133 Mass. 65; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; *Crill v. Rowe*, 47 How. Pr. 398; *Minneapolis Mill Co. v. Board of Water Comrs.*, 56 Minn.

485, 58 N. W. Rep. 33; and see *Fulmer v. Williams*, 122 Pa. St. 191, 15 Atl. Rep. 726; *Williams v. Fulmer*, 151 Pa. St. 405, 25 Atl. Rep. 103; *Auburn v. Union Water Power Co.*, 90 Me. 576, 38 Atl. Rep. 561; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.*, 168 U. S. 349.

<sup>91</sup> *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 305, 28 N. E. Rep. 257. And the taking the water of a public pond by a water

that there was no taking of the plaintiff's property and that he could not recover any compensation.<sup>92</sup> It has been held that interfering with a fishery by a wall or wharf,<sup>93</sup> or destroying a fording by deepening the channel of a public river,<sup>94</sup> were *damnum absque injuria*. A statute of Wisconsin made it unlawful for any person to drive piles, build piers, cribs or other structures in Rock River, in Rock County. It was held to be an attempt to take the property of riparian owners without compensation, and upon this and other grounds was declared invalid.<sup>95</sup> Where a company is authorized to construct tide-water mills, with suitable basins and other works below high water mark, a railroad company cannot cross the same without compensation for the damages occasioned.<sup>96</sup> It has been held in California that one who erected a house in San Francisco Bay had a right of property therein as against the city of San Francisco, which proposed to take the ground it occupied for a public slip.<sup>97</sup> One who has planted oysters in public waters for thirty years acquires no rights as against the public.<sup>98</sup> If one has an exclusive right to the wharfage of a pier, the city cannot appropriate the adjoining slip to the purposes of a ferry without compensation.<sup>99</sup> Defendant was proceeding to erect a building at the foot of a street terminating on Chatauqua Lake, a navigable body of water, and the city filed a bill to enjoin him

company, without authority of law, will be enjoined. *Proprietors of mills v. Braintree Water Supply Co.*, 149 Mass. 478, 21 N. E. Rep. 761.

<sup>92</sup> *Mills v. United States*, 46 Fed. Rep. 738.

<sup>93</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; S. C. 90 Pa. St. 85.

<sup>94</sup> *Zimmerman v. Union Canal Co.*, 1 W. & S. 346.

<sup>95</sup> *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128. The court says: "Any restriction or interruption of the

common and necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution."

<sup>96</sup> *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 16 Pick. 512.

<sup>97</sup> *Gunter v. Geary*, 1 Cal. 462.

<sup>98</sup> *Post v. Kreisler*, 32 Hun, 49; *Lane v. Harbor Comrs.*, 70 Conn. 685; *Lane v. Smith*, 71 Conn. 65, 41 Atl. Rep. 18.

<sup>99</sup> *Murray v. Sharp*, 1 Bos. 539.

from doing so. It was held that the city had no riparian rights and could not maintain the bill and that only the Attorney-General could interfere.<sup>100</sup> The State of Virginia granted to plaintiff submerged lands in York River for oyster beds. The United States in improving the navigation of the river cut a channel through these lands, deposited materials thereon and diverted water therefrom, thus occupying part and destroying the value of the remainder for oyster raising. It was held that the plaintiff had a property right in the lands granted and was entitled to compensation from the Federal Government.<sup>1</sup> A law setting apart certain submerged lands on the margin of Lake Erie for a public shooting ground and forbidding the cutting of rushes thereon was held not to interfere with the riparian owner's rights.<sup>2</sup>

§ 85a. Riparian rights cannot be abolished without compensation. —A statute of Nebraska authorized corporations to appropriate the water of streams more than twenty feet in width, for purposes of irrigation, without compensation to riparian owners. It was held to be contrary to the constitution.<sup>3</sup> The court says: "The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law. That the State may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests, is not doubted. And that the reclamation of the inarable lands of the State is a work of public utility, within the meaning of the constitution, is a proposition not controverted in this proceeding. But even the State, in its sovereign capacity, is, as we have seen, within the restrictions of the constitution, and can take or damage private property only upon the conditions thereby imposed. The

<sup>100</sup> Village of Mayville v. Wilcox, 61 Hun, 223, 40 N. Y. St. 892, 16 N. Y. Supp. 15.

<sup>1</sup> Brown v. United States, 81 Fed. Rep. 55.

<sup>2</sup> People v. Silberwood, 110 Mich. 103.

<sup>3</sup> Clark v. Irrigation Co., 45 Neb. 799, 64 N. W. Rep. 239.



proposition that the rights of riparian proprietors were abolished by operation of the statute is therefore without merit."<sup>4</sup> A statute of Texas, declaring the unappropriated waters of every river or natural stream within the arid portions of the State to be the property of the public, was held to be inoperative as to existing riparian owners on such streams.<sup>5</sup>

§ 86. **Damages from discharge of sewer.**—A municipal corporation has no right to discharge a sewer upon private property, either directly or indirectly, and will be liable for any damage thereby occasioned.<sup>6</sup> Nor has it a right to discharge the same into a private race-way or canal,<sup>7</sup> or mill pond,<sup>8</sup> or even into tide waters so as to impede access to a private wharf or pier,<sup>9</sup> nor so as to create a nuisance in the neighborhood of private property.<sup>10</sup> A city is not

<sup>4</sup> See also *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. Rep. 128; *Prieve v. Wisconsin State Land & Imp. Co. (Wis.)*, 67 N. W. Rep. 918.

<sup>5</sup> *McGee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. Rep. 967; *Barrett v. Metcalfe (Tex. Civ. App.)*, 33 S. W. Rep. 758. See ante § 68.

<sup>6</sup> *Smith v. Atlanta*, 75 Ga. 110; *Jacksonville v. Lambert*, 62 Ills. 519; *Winn v. Rutland*, 52 Vt. 481; *Bradt v. Albany*, 5 Hun, 591; *Byrnes v. Cohoes*, 5 Hun, 602; *Beach v. Elmira*, 22 Hun, 158; *Duryea v. Mayor etc. of New York*, 26 Hun, 120; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. Rep. 1030; *New York Central etc. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. Rep. 416; *Colby v. Village of La Grange*, 65 Fed. Rep. 554; *Martin v. Gainesville, etc. R. R. Co.*, 78 Ga. 307; *State v. Jersey City*,

55 N. J. Eq. 117; *Harris v. City of Philadelphia*, 155 Pa. St. 76, 26 Atl. Rep. 874; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. Rep. 533. But there is no liability if the sewer is laid with the plaintiff's consent. *Searing v. Saratoga Springs*, 39 Hun, 307.

<sup>7</sup> *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Elgin Hydraulic Co. v. Elgin*, 74 Ills. 433.

<sup>8</sup> *Mills v. Nashua*, 63 N. H. 42.

<sup>9</sup> *Sleight v. Kingston*, 11 Hun, 594; *Haskell v. New Bedford*, 103 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218; *Breed v. Lynn*, 123 Mass. 267; *Constitution Wharf Co. v. City of Boston*, 156 Mass. 397, 30 N. E. Rep. 1134; *Butchers' Ice & C. Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. Rep. 376. Nor so as to destroy an oyster bed. *Huffmire v. Brooklyn*, 22 App. Div. N. Y. 406. And see *Atwood v. City of Bangor*, 83 Me. 582, 22 Atl. Rep. 466.

<sup>10</sup> *Scott v. City of Nevada*, 56 Mo. App. 189; *City of Bloomington*,

liable for not providing sufficient sewerage or sewers of sufficient size,<sup>11</sup> nor for an injudicious plan of sewerage,<sup>12</sup> but will of course be liable for any damages caused by negligence in their construction or management.<sup>13</sup> Damages arising from changing, obstructing or otherwise interfering with the flow of surface water by means of sewers, drains and culverts are considered in subsequent sections.<sup>14</sup>

§ 87. **Discharging water upon land; injury by seeping, saturating, etc.**—An early and important decision as to what constitutes a taking was made in Connecticut. Defendant was incorporated for the purpose of constructing and maintaining a canal from New Haven to Northampton.

ton v. Murnin, 36 Ill. App. 647; Dierks v. Comrs. of Highways, 142 Ill. 197, 31 N. E. Rep. 496; Stewart v. Rutland, 58 Vt. 12; Champaign v. Forrester, 29 Ill. App. 117.

<sup>11</sup> Carr v. Northern Liberties, 35 Pa. St. 324; Wright v. Wilmington, 92 N. C. 156; Rozell v. Anderson, 91 Ind. 591; Rice v. Evansville, 108 Ind. 7; St. Paul etc. R. R. Co. v. Duluth, 56 Minn. 494, 58 N. W. Rep. 159.

<sup>12</sup> Johnston v. District of Columbia, 118 U. S. 19; Child v. Boston, 4 Allen 41; City of Seymour v. Cummins, 119 Ind. 148, 24 N. E. Rep. 549. "Where the plan adopted by the municipality must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable; but where the fault found is with the wisdom of the measure, or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted in-

vades no private rights, then the municipality is not liable." Defer v. City of Detroit, 67 Mich. 346, 34 N. W. Rep. 680.

<sup>13</sup> Lewenthal v. Mayor etc. of New York, 5 Lans. 532; Child v. Boston, 4 Allen, 41; Barry v. Lowell, 8 Allen, 127; Stanchfield v. City of Newton, 142 Mass. 110; Reid v. Atlanta, 73 Ga. 523; Denver v. Rhodes, 9 Col. 554; Logansport v. Wright, 25 Ind. 512; Indianapolis v. Huffer, 30 Ind. 235; Terre Haute etc. R. R. Co. v. McCoy, 113 Ind. 498; City of Peru v. Brown, 10 Ind. App. 597; Simpson v. Keokuk, 34 Ia. 568; Allen v. City of Boston, 159 Mass. 324, 34 N. E. Rep. 519; Defer v. City of Detroit, 67 Mich. 346, 34 N. W. Rep. 680; City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. Rep. 370; New York v. Furze, 3 Hill, 612; Vanderslice v. Philadelphia, 103 Pa. St. 102; Gross v. City of Lampsacus, 74 Tex. 195, 11 S. W. Rep. 1086; and see generally on this subject 2 Dill. Munic. Corp. §§ 1046-1052.

<sup>14</sup> See post §§ 89, 89a, 103.

The canal was built and water escaped from the canal by a waste wier, and after passing over the land of intermediate proprietors, washed and gullied the plaintiff's land. In a suit for the damages, it was held that any injury to the land which deprived the owner of the ordinary use and enjoyment of it was equivalent to a taking, and that the plaintiff should recover.<sup>15</sup> Causing water to flow upon land is a clear violation of the right of exclusive occupation and enjoyment, which cannot be taken or interfered with without compensation. Numerous cases support this conclusion.<sup>16</sup> So damage to land caused by percolation and seeping from a mill-pond, canal or reservoir, may be recovered.<sup>17</sup> A railroad company which permitted the waste water from a tank to run upon private property, where it caused damage by freezing and otherwise, was held liable for the

<sup>15</sup> *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; affirmed in *Same v. Same*, 15 Conn. 312.

<sup>16</sup> *How v. Chesapeake & Delaware Canal Co.*, 5 Harr. Del. 245; *Foot v. New Haven & N. Co.*, 23 Conn. 214; *Phinizy v. City Council of Augusta* 47 Ga. 260; *Selden v. Delaware & Hudson Canal Co.*, 24 Barb. 362; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Same*, 31 Wis. 316; *East St. Louis & C. R. R. Co. v. Eisenbraut*, 134 Ill. 96, 24 N. E. Rep. 760; *City of Elgin v. Hoag*, 25 Ill. App., 650; *Wells v. New Haven etc. R. R. Co.*, 151 Mass. 46, 23 N. E. Rep. 724, 1 Am. R. R. & Corp. Rep. 708; *George v. Wabash Western R. R. Co.*, 40 Mo. App. 433; *Koch v. Delaware etc. R. R. Co.*, 54 N. J. L. 401, 24 Atl. Rep. 442; *Stone v. State*, 138 N. Y. 124, 33 N. E. Rep. 733; *Wright v. Syracuse etc. R. R. Co.*, 49 Hun. 445, 23 N. Y. St. 78, 3 N. Y. Supp. 480; S. C. affirmed, 124 N. Y.

668. Contra: *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Pa. St. 357. And see *Noble v. St. Albans*, 56 Vt. 522.

<sup>17</sup> *Ellington v. Bennett*, 59 Ga. 286; *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675; *Wilson v. New Bedford*, 108 Mass. 261; *Griffin v. Lawrence*, 135 Mass. 365; *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. Rep. 229; *Reed v. State*, 108 N. Y. 407, 15 N. E. Rep. 735; *Sayre v. State*, 123 N. Y. 291, 25 N. E. Rep. 163. *Consolidated Home Supply Ditch & R. R. Co. v. Hamlin*, 6 Col. App. 341, 40 Pac. Rep. 582; *Southard v. Brooklyn*, 1 App. Div. N. Y. 175, 37 N. Y. Supp. 136; *Townes v. City Council*, 46 S. C. 15. In *Idaho Springs v. Woodward*, 10 Col. 104, the defendant town was held not liable, for that it granted leave to a company to build a flume in a street, the water of which leaked upon plaintiff's premises and caused damage.

damages resulting therefrom.<sup>18</sup> Where a railroad company filled its land and built a retaining wall against plaintiff's house wall, through which the moisture oozed into plaintiff's house, it was held to be an unreasonable use of the company's land.<sup>19</sup> Where water percolated from a catch-basin into plaintiff's cellar, the town was held not liable.<sup>20</sup>

§ 88. **Rights respecting surface water.**—Respecting surface water which accumulates from rains and melting snows and seeks a lower level, by force of gravity, without flowing in any defined channel, the rights of an owner of land are very different from those respecting running streams. There is considerable conflict in the decisions upon this subject, but we think it may be laid down as the better and more approved doctrine, that an owner of land has a right to have the surface water flow off from his land by the courses and channels in which it is naturally accustomed to flow, and that the lower proprietor has no right to prevent or hinder such flow by erecting barriers or otherwise.<sup>20a</sup> The owner of land also has a right that the pro-

<sup>18</sup> *Chicago & N. W. R. R. Co. v. Hoag*, 90 Ill. 339. To same effect. *Kankakee Water Co. v. Reeves*, 45 Ill. App. 285.

<sup>19</sup> *Hurdman v. North Eastern R. R. Co.*, L. R. 3 C. P. D. 168. To same effect. *Hartman v. Pittsburg Inclined Plane R. R. Co.*, 159 Fa. St. 442, 28 Atl. Rep. 145.

<sup>20</sup> *Kennison v. Beverly*, 146 Mass. 467.

<sup>20a</sup> *Martin v. Riddle*, 26 Pa. St. 415; *Beard v. Murphy*, 37 Vt. 99; *Earle v. DeHart*, 12 N. J. L. (1 Beasley) 280; *Ogburn v. Conner*, 46 Cal. 346; *Toote v. Clifton*, 22 Ohio St. 247; *Laney v. Jasper*, 39 Ills. 46; *Porter v. Durham*, 74 N. C. 767; *Butler v. Peck*, 16 Ohio St. 334; *Livingston v. McDonald*, 21 Ia. 160; *Davis v. Londgreen*, 8 Neb. 43; *Charlton v. Allegheny City*, 1 Grant Cases, 208; *Adams*

*v. Walker*, 34 Conn. 466; *Gray v. Knoxville*, 85 Tenn. 99; *Wood on Nuisances*, (1st ed.) § 386; *Washburn on Easements*, pp. 427, 429, (2d ed.) The latter author says: "The owner of the upper field, in such case, has a natural easement, as it is called, to have the water which falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements." p. 429. *Gould on Waters*, chap ix. *Hughes v. Anderson*, 68 Ala. 280; *Totel v. Bonnefoy*, 123 Ill. 653; *Dayton v. Drainage Comrs.*, 128 Ill. 271, 21 N. E. Rep. 198; *Philadelphia etc. R. R. Co. v. Davis*, 68 Md. 281, 11 Atl. Rep. 822; *Boynton v. Longley*, 19 Nev. 169, 6 Pac. Rep. 437; *Davidheiser v.*

proprietor of lands higher than his own shall not, by artificial means, materially increase the flow of such surface water or discharge it upon him in new or unusual channels.<sup>21</sup> Any proprietor may, of course, consume all the surface water which he finds upon his premises, no matter whence its source, and divert the same whither he pleases, provided he does not injure others by turning it upon them. In other words, the lower estate has no right to the continued or uninterrupted flow of such water.<sup>22</sup> These rights are subject to the paramount right of every proprietor to make a reasonable use of his own land. In agricultural districts one may plough and cultivate his land, though such use may in some degree change the quantity or direction of the flow of surface water upon a lower proprietor, or may in some degree obstruct the flow of such water on to his prem-

Rhodes, 133 Pa. St. 226, 19 Atl. Rep. 400.

<sup>21</sup> *Kauffman v. Greismer*, 26 Pa. St. 407; *Livingston v. McDonald*, 21 Ia. 160; *Hays v. Hinkleman*, 68 Pa.-St. 324; *Porter v. Durham*, 74 N. C. 767; *Adams v. Walker*, 34 Conn. 466; *Wood on Nuisances*, (1st ed.) § 386; *Martin v. Riddle*, 26 Pa. St. 415. In the latter case the court say: "When two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of the water is diverted from its natural

channel, and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields."

*Gregory v. Bush*, 64 Mich. 37, 31 N. W. Rep. 90; *Chapel v. Smith*, 80 Mich. 100, 45 N. W. Rep. 69; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Fleld v. West Orange*, 46 N. J. Eq. 183; *Staton v. Norfolk & C. R. R. Co.*, 109 N. C. 337, 13 S. E. Rep. 933; *Staton v. Norfolk & C. R. R. Co.*, 111 N. C. 278, 16 S. E. Rep. 181; *Davidheiser v. Rhodes*, 133 Pa. St. 226, 19 Atl. Rep. 400. The last case approves the earlier decisions in Pennsylvania.

<sup>22</sup> *Buffum v. Harris*, 5 R. I. 243; *Cott v. Lewiston*, 36 N. Y. 214, 217; *Curtiss v. Ayrault*, 47 N. Y. 73; *Broadbent v. Ramsbottom*, 11 Exch. 602; *Angell on Watercourses*, § 108 r; *Washburn on Easements*, p. 435.

ises from higher land.<sup>23</sup> In determining the question of reasonable use, say the court in one of the cases cited, all the circumstances of the case would have to be taken into consideration, "and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen."<sup>24</sup>

These views in respect to surface water are in conflict with decisions in several of the States.<sup>25</sup> The courts of

<sup>23</sup> *Swett v. Cutts*, 50 N. H. 439, 446; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. Rep. 90; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. Rep. 350; *Rindge v. Sargent*, 64 N. H. 294. In the last case it is held that the reasonableness of the use of land, which obstructs the flow of surface water, is determined by its operation upon the interests of all parties affected by it.

<sup>24</sup> *Swett v. Cutts*, 50 N. H. 439, 446.

<sup>25</sup> *Hovey v. Mayo*, 43 Me. 322; *Bangor v. Lansil*, 51 Me. 521; *Greeley v. Maine Central R. R. Co.*, 53 Me. 200; *Morrison v. Bucksport & Bangor R. R. Co.*, 67 Me. 353; *Gannon v. Hargadon*, 10 Allen, 106; *Inhabitants of Franklin v. Flsk*, 13 Allen, 211; *Parks v. Newburyport*, 10 Gray, 28; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192; *Sprague v. Worcester*, 13 Gray, 193; *Flagg v. Same*, id. 601; *Hoyt v. Hudson*, 27 Wis. 656; *Heth v. Fond du Lac*, 63 Wis. 228; *Waters v. Bay View*, 61 Wis. 642; *Kansas City & Emporia R. R. Co. v. Riley*, 33 Kan. 374; *Chicago etc. R. R. Co. v. Steck*,

51 Kan. 737, 33 Pac. Rep. 601; *Mo. Pac. R. R. Co. v. Renfro*, 52 Kan. 237, 34 Pac. Rep. 802.

*Drake v. Chicago etc. R. R. Co.*, 70 Ia. 59; *Illinois Central R. R. Co. v. Miller (Miss.)*, 10 So. Rep. 61; *Martin v. Benolst*, 20 Mo. App. 262; *Fieled v. Chicago etc. R. R. Co.*, 21 Mo. App. 600; *Burke v. Mo. Pac. R. R. Co.*, 29 Mo. App. 370; *St. Louis etc. R. R. Co. v. Schneider*, 30 Mo. App. 620; *Collier v. Chicago & A. R. R. Co.*, 48 Mo. App. 398; *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472, 18 S. E. Rep. 58; *Norfolk & W. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517; *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641, 50 N. W. Rep. 771; *Crawson v. Grand Trunk R. R. Co.*, 27 U. C. Q. B., 68; *Kenney v. Kansas City etc. R. R. Co.*, 69 Mo. App. 569; *De Lappe, Kansas City etc. R. R. Co.*, 69 Mo. App. 572; *Graves v. Kansas City etc. R. R. Co.*, 69 Mo. App. 574; *Kearney v. Themanson*, 48 Neb. 74, 66 N. W. Rep. 996; *Churchill v. Beethe*, 48 Neb. 87, 66 N. W. Rep. 992; *Town v. Missouri Pac. R. R. Co.*, 50 Neb. 768; *Egener v. New York etc. R. R. Co.*, 3 App. Div. 157,

these States hold that the owner of land may use or improve it without any regard to the surface water which comes upon or flows over it, that he may erect a barrier so as to prevent its flow on to his land, and may discharge it in new channels or in augmented quantities upon the land below. This is known as the "common law rule," or as the "old common law rule." This has been so far modified by the later decisions that it is held by many courts adhering generally to the common law rule, that surface water flowing in a ravine, draw, swale or well defined natural depression, may not be obstructed to the material in-

38 N. Y. Supp. 319; *Cass v. Dicks* (Wash.), 44 Pac. Rep. 113; *Champion v. Crandon*, 84 Wis. 405, 54 N. W. Rep. 775; *Baltzeger v. Carolina Midland R. R. Co.*, 54 S. C. 242, 32 S. E. Rep. 358.

In Minnesota the common law rule as to surface water has been generally adopted.

*Rowe v. St. Paul etc. R. R. Co.*, 41 Minn. 384, 43 N. W. Rep. 76; *Jordan v. St. Paul etc. R. R. Co.*, 42 Minn. 172, 43 N. W. Rep. 849; *Follman v. City of Mankato*, 45 Minn. 457, 48 N. W. Rep. 192; *Brown v. Winona etc. R. R. Co.*, 53 Minn. 259, 55 N. W. Rep. 123. In the recent case of *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. Rep. 462, the court, to some extent, criticises and disapproves former cases, and sums up the rule of the court as follows: "1. The old common-law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force in this state, except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor. Under this rule, it is the duty of an owner draining

his own land to deposit the surface water in some natural drain, if one is reasonably accessible; and he is entitled to deposit the same in such natural drain, though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him. 2. A circumstance to be considered in determining what is a reasonable use of one's own land, under this rule, is the amount of benefit to his estate thus drained, as compared with the amount of injury to his neighbor's estate by reason of casting the burden of the surface water upon it. 3. Subject to these limitations, and the rule that he must in all cases do what is reasonable to dispose of the surface water to the least injury to his neighbors, such owner has a right to drain his own land for some proper use, and cast the water upon theirs, whether such drainage is the direct and sole purpose of the improvement, or only results incidentally therefrom."

The Nebraska court, while adopting the common law rule, adopts also substantially the



jury of the upper estate.<sup>26</sup> Also that surface water may not be collected and poured in a stream upon the lower proprietor.<sup>27</sup> The common law rule is still further modified, indirectly, by introducing the doctrine of negligence, whereby any injurious interference with the flow of surface water in the construction of works for public use, is made actionable upon that ground.<sup>28</sup> But negligence implies a corresponding duty, and every duty implies a corresponding right. To hold that a certain manner of construction which interferes with the flow of surface water is negligent is to hold that the corporation owes a duty not to make such interference; and this again is to hold that the party injured has a right to have the waters flow without such interference. Every one of these cases based upon negligence, in reality affirms that proprietors have rights respecting the flow of surface water, and are, therefore, in effect, innovations upon the old common law rule.

The conflicting decisions in regard to surface water illustrate the fact that property in land differs in the different States. It is not the same in Illinois that it is in the ad-

same modifications of it. *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. Rep. 859; *City of Beatrice v. Leary*, 45 Neb. 149, 63 N. W. Rep. 370.

<sup>26</sup> *Wharton v. Stevens*, 84 Ia. 107, 50 N. W. Rep. 562; *Lincoln etc. R. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. Rep. 859; *City of Beatrice v. Leary*, 45 Neb. 149, 63 N. W. Rep. 370; *Norfolk & W. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517; *St. Louis etc. R. R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. Rep. 791; *Canton etc. R. R. Co. v. Paine* (Miss.), 19 So. Rep. 199; *Town v. Missouri Pac. R. R. Co.*, 50 Neb. 768; *Henry v. Ohio Riv. R. R. Co.*, 40 W. Va. 234, 21 S. E. Rep. 863. And see cases cited in § 89.

<sup>27</sup> *Holmes v. Calhoun County*, 97 Ia. 360, 66 N. W. Rep. 145; *Cannon v. St. Joseph*, 67 Mo. App. 367; *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698; *Clark v. Rochester*, 43 Hun, 367; *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. Supp. 989; *Bidell v. Sea Cliff*, 18 App. Div. N. Y. 261; *Follman v. City of Mankato*, 45 Minn. 457, 48 N. W. Rep. 192; *Illinois Central R. R. Co. v. Miller*, 68 Miss. 760, 10 So. Rep. 61; *Lincoln St. R. R. Co. v. Adams*, 41 Neb. 737, 60 N. W. Rep. 83; *Bunderson v. Burlington etc. R. R. Co.*, 43 Neb. 545, 61 N. W. Rep. 721.

<sup>28</sup> See § 89 and cases cited; *Kearney v. Themanson*, 48 Neb. 74, 66 N. W. Rep. 996.



joining State of Wisconsin. In the former State it includes certain rights in respect to surface water, which are not included in the latter. The subject of this section will be found very fully discussed in Gould on Waters, chapter ix.

§ 88a. **What constitutes surface water.**—**Flood waters of stream.**—As a general rule, there is not much question as to what constitutes surface water and what does not. In those States which recognize no rights, or substantially none, in respect to surface water, it is often made a nice question whether the waters flowing in a ravine, channel or natural depression constitute a stream, which cannot be interfered with without liability, or mere surface water, which may be treated as a common enemy. It is also a mooted question whether the flood waters of a stream, which spread out over the low lands in times of high water, are a part of the stream or only surface water. Without entering upon a discussion of these questions, we refer to some of the authorities where they are discussed.<sup>29</sup>

<sup>29</sup> As to whether the course by which surface water finds its way to lower levels, is a water course or not, see *Morrissey v. Chicago etc. R. R. Co.*, 38 Neb. 406, 56 N. W. Rep. 946; *Bunderson v. Burlington etc. R. R. Co.*, 43 Neb. 545, 61 N. W. Rep. 721; *Chicago etc. R. R. Co. v. Steck*, 51 Kan. 737, 33 Pac. Rep. 601; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. Rep. 90.

As to the flood waters of a stream, it is said by the court, in *O'Connell v. East Tenn. V. & G. R. R. Co.*, 87 Ga. 246, 13 S. E. Rep. 489: "If the flood water becomes severed from the main current, or leaves the stream never to return, and spreads out over the low ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel,

or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the stream. The identity of the river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water course. So, on the other hand, it may have a 'flood channel' to retain the surplus waters until they can be discharged by the natural flow." To same effect *Sullens v. Chicago etc. R. R. Co.*, 74 Ia. 659, 38 N. W. Rep. 545; *Noe v. C. B. & Q. R. R. Co.*, 76 Ia. 360, 41 N. W. Rep. 42; *Byrne v. Minn. & St. L. R. R. Co.*, 38 Minn. 212, 36 N. W. Rep. 339; *Morrissey v. C. B. &*

§ 89. What interference with surface water is a taking.— An interference with any right respecting surface water in the exercise of the eminent domain power is a taking. If a railroad company so constructs its road as to obstruct the flow of surface water and dam it back upon private property, it will be liable therefor.<sup>30</sup> The same rule applies to a

Q. R. R. Co., 38 Neb. 406, 56 N. W. Rep. 946; Cairo etc. R. R. Co. v. Brevoort, 62 Fed. Rep. 129; Chicago etc. R. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. Rep. 540; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367.

For the contrary view see Kansas City etc. R. R. Co. v. Smith, 72 Miss. 677, 17 So. Rep. 78; New York etc. R. R. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. Rep. 541; Missouri Pac. R. R. Co. v. Keys, 55 Kan. 205, 40 Pac. Rep. 275; Schneider v. Mo. Pac. R. R. Co., 29 Mo. App. 68. And see Yazoo etc. R. R. Co. v. Davis, 73 Miss. 678, 19 So. Rep. 487; Cass v. Dicks (Wash.), 44 Pac. Rep. 113.

<sup>30</sup> Gillham v. Madison County R. R. Co., 49 Ills. 484; Illinois & St. Louis R. R. Co. v. Fehringer, 82 Ills. 129; Chicago, Rock Island & Pacific R. R. Co. v. Casey, 90 Ills. 514; Kankakee & Seneca R. R. Co. v. Horan, 22 Ills. App. 145; Shane v. Kansas City, St. Joe & C. B. R. R. Co., 71 Mo. 237. This is an elaborate case, and overrules prior decisions. Compare Munkers v. Same, 72 Mo. 514; S. C. 60 Mo. 334, and Hoshier v. Same, 60 Mo. 329. (But Shane's case is in turn overruled in Abbot v. Kansas City & St. Joseph R. R. Co., 83 Mo. 271, and Jones v. St. Louis etc. Ry. Co., 84 Mo 151); Bentonville R. R.

Co. v. Baker, 45 Ark. 252; Payne v. Morgan's La. & Tex. R. R. etc. Co., 38 La. An. 164; Texas Central Ry. Co. v. Clifton, 2 Tex. App. Civil Cas. 433; Gulf, Col. & S. F. Ry. Co. v. Helsley, 62 Tex. 593; Sabine & East Tenn. R. R. Co. v. Johnson, 65 Tex. 389; Gulf, Col. & Santa Fe R. R. Co. v. Holliday, 65 Tex. 512; Raleigh & Augusta Air Line R. R. Co. v. Wicher, 74 N. C. 220; Drake v. Chicago, R. I. & P. Ry. Co., 63 Ia. 302; Indiana, Bloomington & Western Ry. Co. v. Eberle, 110 Ind. 542; Owens v. Missouri Pacific Ry. Co. 67 Tex. 679; Chicago & A. R. R. Co. v. Henneberry, 153 Ill. 354, 38 N. E. Rep. 1043; Kankakee etc. R. R. Co. v. Horan, 22 Ill. App. 145; Same v. Same, 23 Ill. App. 259; Chicago & A. R. R. Co. v. Henneberry, 28 Ill. App. 110; Ohio & M. R. R. Co. v. Ramey, 39 Ill. App. 409; Chicago & A. R. R. Co. v. Henneberry, 42 Ill. App. 126; Ohio & M. R. R. Co. v. Thillman, 43 Ill. App. 78; Ohio & M. R. R. Co. v. Combs, 43 Ill. App. 119; Ohio & M. R. R. Co. v. Neutzel, 43 Ill. App. 108; Wabash R. R. Co. v. Sanders, 47 Ill. App. 436; Miller v. Chicago & E. R. R. Co., 60 Ill. App. 51; Philadelphia etc. R. R. Co. v. Davis, 68 Md. 281, 11 Atl. Rep. 822; Sinai v. Louisville etc. R. R. Co., 71 Miss. 547, 14 So. Rep. 87; Fletcher v. Auburn

municipal corporation executing a public work.<sup>31</sup> A railroad company constructed an embankment which formed a barrier to the natural flow of surface water and caused the same to collect in a ditch beside the road, in which it ran for a long distance and was then discharged through a culvert upon the plaintiff's land, where it had not been accustomed to flow before. The company was held liable on the ground of its being a taking.<sup>32</sup> And, generally, it is a taking to

etc. *R. R. Co.*, 25 Wend. 462; *Flick v. Pennsylvania R. R. Co.*, 157 Pa. St. 622, 27 Atl. Rep. 783; *Texas & P. R. R. Co. v. Snyder*, 18 S. W. Rep. 559; *Gulf etc. R. R. Co. v. Jones*, 3 Tex. Ct. of App. J. 41, § 22; *S. A. & A. R. R. Co. v. Gwynn*, 4 Tex. Ct. of App. J. 338, § 219; *Bonner v. Worth*, 5 Tex. Civ. App. 560, 24 S. W. Rep. 306; *Savannah, etc. R. R. Co. v. Buford*, 106 Ala. 303, 17 So. Rep. 395; *St. Louis etc. R. R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. Rep. 791; *Canton etc. R. R. Co. v. Paine (Miss.)*, 19 So. Rep. 199; *Tucker v. Chicago etc. R. R. Co.*, 66 Mo. App. 141; *Nichols v. Norfolk & W. R. R. Co.*, 120 N. C. 495; *Henry v. Ohio Riv. R. R. Co.*, 40 W. Va. 234, 21 S. E. Rep. 863; *Shohan v. Alabama Great Southern Ry. Co.*, 115 Ala. 181; *Southern Ry. Co. v. Cook*, 106 Ga. 450, 32 S. E. Rep. 585; *Baltimore etc. R. R. Co. v. Hackett*, 87 Md. 224; *Jungblum v. Minneapolis etc. R. R. Co.*, 70 Minn. 153, 72 N. W. Rep. 971.

<sup>31</sup> *Bowman v. New Orleans*, 27 La. An. 501; *Maguire v. Centerville*, 76 Ga. 84; *Peters v. Fergus Falls*, 35 Minn. 549; *Conniff v. San Francisco*, 67 Cal. 45; *Los Angeles Cem. Ass. v. Los Angeles*, 103 Cal. 461, 37 Pac.

Rep. 375; *Town of Lake v. Bok*, 33 Ill. App. 45; *Rice v. City of Flint*, 67 Mich. 401, 34 N. W. Rep. 719; *City of Beatrice v. Leary*, 45 Neb. 149, 63 N. W. Rep. 370; *Clark v. Rochester*, 43 Hun, 271; *Acker v. Town of New Castle*, 48 Hun, 312, 15 N. Y. St. 894, 1 N. Y. Supp. 223; *Cooper v. City of Dallas*, 83 Tex. 239, 18 S. W. Rep. 565.

<sup>32</sup> *T. W. & W. Ry. Co. v. Morrison*, 71 Ill. 616; *Benson v. Chicago & Alton R. R. Co.*, 78 Mo. 504; *Hogenson v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 31 Minn. 224. In *Chicago & Alton R. R. Co. v. Glenney*, 118 Ill. 487, where damages were claimed in a similar case, it was held that the company was not liable for damages caused by water brought into its ditch by artificial channels connected with the ditch without its consent. And see *Curtis v. Eastern R. R. Co.*, 14 Allen 55; *Moses v. St. Louis, Iron Mountain & Southern Ry. Co.*, 85 Mo. 86; *Mitchell v. New York, Lake Erie & Western R. R. Co.*, 36 Hun, 177; *Rathke v. Gardner*, 134 Mass. 14.

It is no defense that the railroad is properly constructed so far as its use for railroad purposes is concerned. "A railroad



collect surface water into a channel and turn it upon land where it has not been accustomed to flow.<sup>33</sup> The decisions

company must construct its road not only with reference to the safety of the traveling public, but also with reference to the rights of adjacent land owners." *McCleneghan v. Omaha R. R. Co.*, 25 Neb. 523.

<sup>33</sup> *McCormick v. Kansas City, St. Joe & C. B. R. R. Co.*, 70 Mo. 359; *Arn v. City of Kansas*, 4 *McCrary*, 558; *G. C. S. F. Ry. Co. v. Donahoo*, 59 Tex. 128; *Chase v. New York Central R. R. Co.*, 24 Barb. 273; *Crawfordsville v. Bond*, 96 Ind. 236; *Cubit v. O'Dett*, 51 Mich. 347; *Seifert v. Brooklyn*, 101 N. Y. 136; *West Orange v. Field*, 37 N. J. Eq. 600; *Huddlestun v. Borough of West Bellvue*, 111 Pa. St. 110; *G. H. & S. A. Ry. Co. v. Tait*, 63 Tex. 223; *Fort Worth & Denver City Ry. Co. v. Scott*, 2 Tex. App. Civil Cas. p. 137; *Jacksonville R. R. Co. etc. v. Cox*, 91 Ill. 500; *Aurora v. Love*, 93 Ill. 521; *Blakeley v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; *Whalley v. Lancashire & Yorkshire Ry. Co.*, 13 L. R. Q. B. 131; *S. C. affd.* 16 Same, 227; *Troy v. Coleman*, 58 Ala. 570; *Eufaula v. Simmons*, 86 Ala. 515; *Springfield etc. R. R. Co. v. Henry*, 44 Ark. 360; *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. Rep. 692; *Georgia etc. Co. v. Baker*, 88 Ga. 28, 13 S. E. Rep. 831; *City of Albany v. Sikes*, 94 Ga. 30, 20 S. E. Rep. 257; *Elgin v. Kimball*, 90 Ill. 356; *Young v. Comrs.*, 134 Ill. 569, 25 N. E. Rep. 689; *Graham v. Keene*, 143 Ill. 425, 32 N. E. Rep. 180; *Chicago & A. R.*

*R. Co. v. Connors*, 25 Ill. App. 561; *Chicago & A. R. R. Co. v. Riley*, 25 Ill. App. 569; *St. Louis etc. R. R. Co. v. Hurst*, 25 Ill. App. 98; *S. C. 14 Ill. App. 419*; *Chicago & A. R. R. Co. v. Glenney*, 28 Ill. App. 364; *Allen v. Michel*, 38 Ill. App. 313; *Illinois Central R. R. Co. v. Heisner*, 45 Ill. App. 143; *Patoka Tp. c. Hopkins*, 131 Ind. 142, 30 N. E. Rep. 896; *Lake Erie & W. R. R. Co. v. Hilfsker*, 12 Ind. App. 280, 40 N. E. Rep. 80; *Hitchins v. Frostburg*, 68 Md. 100, 11 Atl. Rep. 826; *Frostburg v. Hitchins*, 70 Md. 56, 16 Atl. Rep. 380; *Frostburg v. Dufty*, 70 Md. 47, 16 Atl. Rep. 642; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. Rep. 90; *Township of Blakely v. Devine*, 36 Minn. 53; *Olson v. St. Paul etc. R. R. Co.*, 38 Minn. 419, 37 N. W. Rep. 953; *Follman v. City of Mankato*, 45 Minn. 457, 48 N. W. 192; *Illinois Central R. R. Co. v. Miller (Miss.)* 10 So. Rep. 61; *Psychlicke v. City of St. Louis*, 98 Mo. 497, 11 S. W. Rep. 1001; *Carson v. City of Springfield*, 53 Mo. App. 289; *Fremont etc. R. R. Co. v. Morley*, 25 Neb. 138, 40 N. W. Rep. 948; *State v. Fillmore County*, 32 Neb. 870, 49 N. W. Rep. 769; *Lincoln St. R. R. Co. v. Adams*, 41 Neb. 737, 60 N. W. Rep. 83; *Bunderson v. Burlington etc. R. R. Co.*, 43 Neb. 545, 61 N. W. Rep. 721; *Field v. West Orange*, 46 N. J. Eq. 183; *Soule v. City of Passaic*, 47 N. J. Eq. 28, 20 Atl. Rep. 346; *Moran v. McClearn*, 63 Barb. 185; *Staton v. Norfolk & c. R. C. Co.*, 109

are substantially unanimous as to the liability in such cases, but the ground of liability is usually that of improper construction. But all the cases recognize the right of a proprietor not to be injured by having the water poured upon his land in a stream, and if this right is interfered with by a permanent maintenance of the works causing the injury, there is a taking within the constitution.<sup>34</sup> Decisions contrary to the foregoing will be found in those States which hold a different doctrine regarding surface water.<sup>35</sup> In

N. C. 337, 13 S. E. Rep. 933; *Staton v. Norfolk &c. R. R. Co.*, 111 N. C. 278, 16 S. E. Rep. 181; *Gordon v. Pennsylvania R. R. Co. (Pa.)*, 6 Rep. 727; *Elliott v. Oil City*, 129 Pa. St. 570, 18 Atl. Rep. 553; *Torrey v. City of Scranton*, 133 Pa. St. 173, 19 Atl. Rep. 351; *Weir v. Borough of Plymouth*, 148 Pa. St. 566, 24 Atl. Rep. 94; *Bohan v. Borough of Avoca*, 154 Pa. St. 404, 26 Atl. Rep. 604; *Austin & N. W. R. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484; *Texas & P. R. R. Co. v. Dunn (Tex.)*, 17 S. W. Rep. 822; *City of Houston v. Bryan*, 2 Tex. Civ. App. 553, 22 S. W. Rep. 231; *Norfolk & W. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517; *Northwood v. Raleigh*, 3 Ontario 347; *Stalker v. Dunwick*, 15 Ontario, 342; *Miner v. Buffalo etc. R. R. Co.*, 9 U. C. C. P. 280; *Rowe v. Rochester*, 22 U. C. C. P. 319; *Rowe v. Rochester*, 29 U. C. Q. B. 590; *Holmes v. Calhoun County*, 97 Ia. 360, 66 N. W. Rep. 145; *Cannon v. St. Joseph*, 67 Mo. App. 367; *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698; *Clark v. Rochester*, 43 Hun, 271; *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. Supp. 989;

*Bedell v. Sea Cliff*, 18 App. Div. 261; *Parker v. Norfolk etc. R. R. Co.*, 119 N. C. 676; *Bench v. Wilmington & W. R. R. Co.*, 120 N. C. 498; *Jewett v. Sweet*, 178 Ill. 96; affirming S. C. 71 Ill. App. 641; *Effingham v. Surralls*, 77 Ill. App. 460; *Commissioners of Highways v. Sweet*, 77 Ill. App. 641; *Robbins v. Willmar*, 71 Minn. 403, 73 N. W. Rep. 1097; *Parker v. Norfolk etc. R. R. Co.*, 123 N. C. 71, 31 S. E. Rep. 381.

<sup>34</sup> *T. W. & W. R. R. Co. v. Morrison*, 71 Ill. 616; *Staton v. Norfolk &c. R. R. Co.*, 111 N. E. 278, 16 S. E. Rep. 181; *Norfolk & W. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517; *Miller v. Morristown*, 47 N. J. Eq. 62, 2 Atl. Rep. 61; *Kankakee etc. R. R. Co. v. Horan*, 22 Ill. App. 145.

<sup>35</sup> *Greeley v. Maine Central R. R. Co.*, 53 Me. 200; *Morrison v. Bucksport & Bangor R. R. Co.*, 67 Me. 353; in this case the court say that "any proprietor of land may control the flow of mere surface water over his premises, according to his own wants and interests, without obligation to any proprietor either above or below." *Cassidy v. Old Colony R. R. Co.*, 141

addition to the cases already referred to, there are numerous others which are more particularly grounded upon negligence in constructing and maintaining insufficient culverts or ditches, or in allowing the same to become filled up and

Mass. 174; A. T. & S. F. R. R. Co. v. Hammer, 22 Kan. 763; O'Connor v. Fond du Lac, A. & P. Ry. Co., 52 Wis. 526; Wagner v. Long Island R. R. Co., 2 Hun, 633; New Albany & Salem R. R. Co. v. Higman, 18 Ind. 77; Cairo & Vincennes R. R. Co. v. Stevens, 73 Ind. 278; Clark v. Hannibal & St. Joe R. R. Co., 36 Mo. 202; Hosher v. K. C. St. J. & C. B. R. R. Co., 60 Mo. 329; Munkres v. Same, 60 Mo. 334; Same v. Same, 72 Mo. 514. It has been held in Massachusetts that such damages may be taken into consideration in assessing compensation under the statute. Walker v. Old Colony & Newport R. R. Co., 103 Mass. 10; Byrne v. Town of Farmington, 64 Conn. 367, 30 Atl. Rep. 138; Hannaker v. St. Paul etc. R. R. Co., 5 Dak. 1; Herring v. District of Columbia, 3 Mackey, 572; Hill v. Cincinnati etc. R. R. Co., 109 Ind. 511; Chicago etc. R. R. Co. v. Steck, 51 Kan. 737, 33 Pac. Rep. 601; Missouri Pac. R. R. Co. v. Renfro, 52 Kan. 237, 34 Pac. Rep. 802; Parish of Concordia v. Natchez etc. R. R. Co., 44 La. An. 613, 10 So. Rep. 809; Gardiner v. Camden, 86 Me. 377, 30 Atl. Rep. 13; Rowe v. St. Paul etc. R. R. Co., 41 Minn. 384, 43 N. W. Rep. 76 (disapproved in Sheehan v. Flynn, 59 Minn. 436, 61 N. W. Rep. 462); Jordan v. St. Paul etc. R. R. Co., 42 Minn. 172, 43 N. W. Rep. 849 (criticised in

Sheehan v. Flynn, 59 Minn. 436, 61 N. W. Rep. 462); Brown v. Winona etc. R. R. Co., 53 Minn. 259, 55 N. W. Rep. 123; Payne v. Kansas City etc. R. R. Co., 112 Mo. 6, 20 S. W. Rep. 322; Jones v. Wabash etc. R. R. Co., 18 M. J. App. 251; St. Louis etc. R. R. Co. v. Schneider, 30 Mo. App. 620; Collier v. Chicago etc. R. R. Co., 48 Mo. App. 398; Rose v. St. Charles, 49 Mo. 509; Morrissey v. Chicago etc. R. R. Co., 38 Neb. 406, 56 N. W. Rep. 946; Anchor Brewing Co. v. Village of Dobbs Ferry, 84 Hun, 274, 32 N. Y. Supp. 371; Willey v. Norfolk So. R. R. Co., 98 N. C. 263; Jenkins v. Wilmington & W. R. R. Co., 110 N. C. 438, 15 S. E. Rep. 193; Fleming v. Wilmington & W. R. R. Co., 115 N. C. 676, 20 S. E. Rep. 714; Edwards v. Charlotte etc. R. R. Co., 39 S. C. 472, 18 S. E. Rep. 58; Texas Trunk R. R. Co. v. Elam, 1 Tex. App. Civ. Cases, p. 201; Johnson v. Chicago etc. R. R. Co., 80 Wis. 641, 50 N. W. Rep. 771; Wallace v. Grand Trunk R. R. Co., 16 U. C. Q. B. 551; Vanhorn v. Grand Trunk R. R. Co., 18 U. C. Q. B. 356; Crewson v. Grand Trunk R. R. Co., 27 U. C. Q. B. 68; Kenney v. Kansas City etc. R. R. Co., 69 Mo. App. 569; De Lapp v. Kansas City etc. R. R. Co., 69 Mo. App. 572; Graves v. Kansas City etc. R. R. Co., 69 Mo. App. 574; Town v. Missouri Pac. R. R. Co., 50 Neb. 768.

out of repair.<sup>36</sup> Cases in respect to damages from surface water, resulting from the grading and improvement of streets are referred to in the next chapter.<sup>37</sup>

§ 89a. **Miscellaneous cases in regard to surface water.**—Where the damages are due solely to a fall of rain so extraordinary as to amount to an act of God, there is no liability.<sup>38</sup> A railroad company is not liable for water which comes upon the plaintiff's land from its road-way, but

<sup>36</sup> Carriger v. R. R. Co., 7 Lea, Tenn. 388; Mississippi Central R. R. Co. v. Caruth, 51 Miss. 77; Same v. Mason, 51 Miss. 234; Johnson v. Atlantic & St. Lawrence R. R. Co., 35 N. H. 569; German Theological School v. Dubuque, 64 Ia. 736; Waterman v. C. & P. R. R. Co., 30 Vt. 610. St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; St. Louis etc. R. R. Co. v. Yarbrough, 56 Ark. 612, 20 S. W. Rep. 515; Kansas City etc. R. R. Co. v. Cook, 57 Ark. 387, 21 S. W. Rep. 1066; Ohio etc. R. R. Co. v. Dooley, 32 Ill. App. 228; Indiana etc. R. R. Co. v. Patchett, 59 Ill. App. 251; Louisville etc. R. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. Rep. 546; Willits v. Chicago etc. R. R. Co., 80 Ia. 531, 45 N. W. Rep. 516; Hunt v. Iowa Central R. R. Co., 86 Ia. 15, 52 N. W. Rep. 668; Willits v. Chicago etc. R. R. Co., 88 Ia. 281, 55 N. W. Rep. 313; Lincoln etc. R. R. Co. v. Sutherland, 44 Neb. 526, 62 N. W. Rep. 859; Waters v. Greenleaf Johnson Lumber Co., 115 N. C. 648, 20 S. E. Rep. 718; Wal-drop v. Greenwood etc. R. R. Co., 28 S. C. 157, 5 S. E. Rep. 471; Gentry v. Richmond & D. R. R. Co., 38 S. C. 284, 16 S. E. Rep. 893; Sabine etc. R. R. Co. v. Brouard, 69 Tex. 617, 7 S. W.

Rep. 374; Green v. Taylor etc. R. R. Co., 79 Tex. 604, 15 S. W. Rep. 685; Brouard v. Sabine etc. R. R. Co., 80 Tex. 329, 16 S. W. Rep. 30; Gulf etc. R. R. Co. v. Frederickson (Tex.), 19 S. W. Rep. 124; Galveston etc. R. R. Co. v. Ryan, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011; Alton v. Hamilton etc. R. R. Co., 13 U. C. Q. B. 595; L'Esperance v. Great Western R. R. Co., 14 U. C. Q. B. 187; Carron v. Great Western R. R. Co., 14 U. C. Q. B. 192; Kearney v. Themanson, 48 Neb. 74, 66 N. W. Rep. 996.

<sup>37</sup> Cleveland etc. R. R. Co. v. Huddleston, 21 Ind. App. 621; Dudley v. Buffalo, 73 Minn. 347, 74 N. W. Rep. 44; Harrelson v. Kansas City etc. R. R. Co., 151 Mo. 482; Baltzeger v. Carolina Midland R. R. Co., 54 S. C. 242, 32 S. E. Rep. 358; Borchsenius v. Chicago etc. R. R. Co., 96 Wis. 448; Huntsville v. Ewing, 113 Ala. 576, 22 So. Rep. 984; post, § 103.

<sup>38</sup> Philadelphia etc. R. R. Co. v. Davis, 68 Md. 281, 11 Atl. Rep. 822; Sabine etc. R. R. Co. v. Brouard, 69 Tex. 617, 7 S. W. Rep. 374; and see Fick v. Pennsylvania R. R. Co., 107 Pa. St. 622, 27 Atl. Rep. 783; Sentman v. B. & O. R. R. Co., 78 Md. 222, 27 Atl. Rep. 1074.



which is caused to accumulate or flow upon the right of way by the acts of others.<sup>39</sup> And where the accumulation of water causing the damage is due in part to the acts of others than the defendant, the defendant is not excused for its own part and it is held to be the province of the jury to determine what this is as best they can.<sup>40</sup> Where a borough turned surface water upon a township road and the township got rid of it by turning it upon plaintiff, it was held the latter had no cause of action against the borough.<sup>41</sup> Where a railroad company causes water to accumulate and form a stagnant pool, injurious to health, it will be liable.<sup>42</sup> Where a city conducted water into a hole in an alley, whence it overflowed plaintiff, it was held liable.<sup>43</sup> Where a railroad intersected ditches, which took the water from the railroad ditches, to the damage of land either above or below, it was held not liable.<sup>44</sup> The fact that a ditch is built along a railroad right of way, which carries the water from adjoining lands to a stream, does not require the company to keep it open and no action will lie for allowing it to become obstructed.<sup>45</sup> It has been held that one who has stood by and seen a railroad embankment constructed without a culvert is estopped to complain of such defect.<sup>46</sup> One has no legal ground of complaint that there is caused to flow upon his land such surface water as would come thereon by nature, though it has been temporarily deflected from his land by non-natural causes.<sup>47</sup>

<sup>39</sup> *Brimberry v. Savannah etc. R. R. Co.*, 78 Ga. 641; *Burke v. Mo. Pac. R. R. Co.*, 29 Mo. App. 370; and see *Felt v. Vicksburg etc. R. R. Co.*, 46 La. An. 549, 15 So. Rep. 177.

<sup>40</sup> *Ohio & M. R. R. Co. v. Combs*, 43 Ill. App. 119; *Illinois Central R. R. Co. v. Helsner*, 45 Ill. App. 143.

<sup>41</sup> *West Bellevue Bor. v. Huddleston*, 1 Monaghan (Pa. Supm.) 129.

<sup>42</sup> *Lockett v. Ft. Worth etc. R. R. Co.*, 78 Tex. 211, 14 S. W. Rep.

564; and see *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. Rep. 277.

<sup>43</sup> *City of New Albany v. Ray*, 3 Ind. App. 321, 29 N. E. Rep. 611.

<sup>44</sup> *Bell v. Norfolk So. R. R. Co.* 101 N. C. 21, 7 S. E. Rep. 467; *Willey v. Norfolk So. R. R. Co.*, 98 N. C. 263.

<sup>45</sup> *Louisville etc. R. R. Co. v. McAfee*, 30 Ind. 291.

<sup>46</sup> *Payne v. Morgan's R. R. Co.*, 43 La. An. 981, 10 So. Rep. 10.

<sup>47</sup> *Avery v. Police Jury*, 12 La. An. 554; *Whitney v. Willamette*



In Missouri it is provided by statute that every railroad, within three months after its completion, shall "cause to be constructed and maintained suitable ditches and drains along each side of the road-bed of such railroad, to connect with ditches, drains or water courses, so as to afford sufficient outlet to drain and carry off the water along such railroad wherever the draining of such water has been obstructed or rendered necessary by the construction of such railroad."<sup>48</sup> A failure to comply with the statute, affords a cause of action to one damaged by such failure.<sup>49</sup> But the statute does not apply unless there are ditches, drains or water courses with which to connect.<sup>50</sup> There are similar statutes in other States.<sup>51</sup>

§ 90. Subterranean waters.—In regard to water which permeates the soil but is not collected in any stream under ground, the owner of the soil may use or divert it as he sees proper, provided, of course, that he does not turn it upon others in an unreasonable manner, to their injury.<sup>52</sup> Accordingly, where the construction of a railroad resulted in draining off a tract of low, marshy ground which had served as a sort of reservoir for the plaintiff's mill, so that in dry times the supply was insufficient and in times of rain too

Bridge R. R. Co., 23 Or. 188, 31 Pac. Rep. 472; Felt v. Vicksburg etc. R. R. Co., 46 La. An. 549, 15 So. Rep. 177; Inhabitants of Hamilton v. Wainwright, 52 N. J. Eq. 419, 29 Atl. Rep. 200; King v. C. B. & Q. R. R. Co., 71 Ia. 696.

<sup>48</sup> Mo. R. S. § 810; Byrne v. Keokuk etc. R. R. Co., 47 Mo. App. 383; Clark v. Dyer, 81 Tex. 339, 16 S. W. Rep. 1061.

<sup>49</sup> Byrne v. Keokuk etc. R. R. Co., 47 Mo. App. 383.

<sup>50</sup> Field v. Chicago etc. R. R. Co., 21 Mo. App. 600.

<sup>51</sup> See Clark v. Dyer, 81 Tex. 339, 16 S. W. Rep. 1061.

<sup>52</sup> Chasemore v. Richards, 7 H.

L. Cas. 349; 5 H. & N. 982; 2 H. & N. 168; Rawston v. Taylor, 11 Exch. 367; Greenleaf v. Francis, 18 Pick. 117; Ocean Grove Camp Meeting Association v. Asbury Park, 40 N. J. Eq. 447; Roath v. Driscoll, 20 Conn. 533; Wood on Nuisances (1st ed.) § 383; Washburn on Easements, pp. 452-457; Gould on Waters, § 280; Acton v. Blundell, 12 M. & W. 324; Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274; Meyer v. Tacoma L. & W. Co., 8 Wash. 144, 35 Pac. Rep. 601; Edwards v. Haeger, 180 Ill. 99; Gould v. Eaton, 111 Cal. 649, 44 Pac. Rep. 319; Tampa Water Works Co. v. Cline, 37 Fla. 586,

great, it was held that the plaintiff had no cause of action.<sup>53</sup> And where a railroad company has appropriated a stream of water fed by a spring on another's land, it cannot prevent the owner of such land from digging trenches for the improvement of his own land, though the effect will be to divert the percolating waters which supply the spring.<sup>54</sup> Where a well, dug by a railroad on its own land, destroyed a spring on the plaintiff's land, it was held there was no liability.<sup>55</sup> So where a spring was destroyed by the construction of a sewer in a public street;<sup>56</sup> also where plaintiff's well was drained by a tunnel built by a railroad on its right of way.<sup>57</sup> A city obtained a part of its water supply by means of wells to which a powerful suction was applied. This lowered the spring level of the adjacent territory and dried up a stream and pond on the plaintiff's land half a mile away. The city was held liable for damages.<sup>58</sup>

Where an act of Congress for the construction of a tunnel to supply the city of Washington with water provided for compensation to any person injured in any property right thereby, it was held that a claim for damages by

20 So. Rep. 780; *Metcalf v. Nelson* (S. D.), 65 N. W. Rep. 911; also cases cited in following notes.

<sup>53</sup> *Waffle v. New York Central R. R. Co.*, 58 Barb. 413; S. C. affirmed 53 N. Y. 11; *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; *Thayer v. Brooks*, 17 Ohio 489.

<sup>54</sup> *Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. Rep. 783.

<sup>55</sup> *Hougan v. Milwaukee & St. Paul Ry. Co.*, 35 Ia. 558; *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; and see *Lybe's Appeal*, 106 Pa. St. 626, and *Roath v. Driscoll*, 20 Conn. 532; *Ocean Grove Camp Meeting Association v. Asbury Park*, 40 N. J. Eq. 447.

<sup>56</sup> *Elster v. City of Springfield*,

49 Ohio St. 82, 30 N. E. Rep. 274; *Stanton v. Metropolitan B'd of Works*, 26 L. J. Ch. 300.

<sup>57</sup> *Galgay v. Great Southern R. R. Co.*, 4 I. C. L. R. 456. But in *Sheldon v. Boston etc. R. R. Co.*, 172 Mass. 180, 57 N. E. Rep. 1078, where a railroad in making a deep cut on its own land drained the plaintiff's well, it was held liable.

<sup>58</sup> *Smith v. Brooklyn*, 160 N. Y. 357; affirming S. C. 32 App. Div. 257; *Smith v. Brooklyn*, 18 App. Div. N. Y. 340; and see *Hollingsworth & V. Co. v. Foxborough Water Supply Dist.*, 165 Mass. 186, 42 N. E. Rep. 574; *Merrick Water Co. v. Brooklyn*, 32 App. Div. N. Y. 454; *Forbell v. New York*, 27 N. Y. Misc. 12.

the draining of a well five hundred feet away was within the act.<sup>50</sup> Where a natural gas company in boring a well encountered salt water, which rose and found its way through veins in the rock and destroyed the value of neighboring wells, and the geological formation was well known and the consequences to be anticipated, and the injury could have been prevented by a small outlay, it was held the company was liable.<sup>60</sup> Where the waters of a stream sink into the ground and become percolating water, the same rule applies thereto as to other percolating waters, and the owner of the soil may divert them without liability.<sup>61</sup> But percolating waters adjacent to a stream and moving in the same direction may constitute a part of the stream.<sup>62</sup> In regard to subterranean streams, there is much confusion among the authorities as to the rights of the owner of the soil. The better opinion, perhaps, is, that the same rules apply to them as to percolating waters.<sup>63</sup> Some confusion exists in regard to the pollution of water

<sup>50</sup> *United States v. Alexander*, 148 U. S. 186, 13 S. C. Rep. 527. So under a statute rendering a city liable for "damages occasioned by the laying, making or maintaining" of a sewer, it was held liable for draining a well on adjoining land. *Trobridge v. Brookline* 144 Mass. 139.

<sup>60</sup> *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 18 Atl. Rep. 1012; *Collins v. Chartiers Valley Gas Co.*, 139 Pa. St. 111, 21 Atl. Rep. 147.

<sup>61</sup> *Meyer v. Tacoma L. & W. Co.*, 8 Wash. 144, 35 Pac. Rep. 601.

<sup>62</sup> *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585.

<sup>63</sup> *Lybe's Appeal*, 106 Pa. St. 626; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Pa. St. 528; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Acton v. Blundell*, 12 M. & W.

324; *Roath v. Driscoll*, 20 Conn. 532; *Brown v. Illius*, 25 Conn. 583; *Hale v. McLea*, 53 Cal. 578; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Angell on Watercourses*, pp. 150-159; *Washburn on Easements*, pp. 441-448; *Gould on Waters*, § 281. In a recent case the Supreme Court of Florida in its syllabus states the law as follows: "The owner of land through which subsurface water, without any distinct, definite, and known channel, percolates or filters through the soil to that of an adjoining owner, is not prohibited from digging into his own soil, and appropriating water found there to any legitimate purposes of his own, though, by so doing, the water may be entirely diverted from the land to which it would otherwise naturally have passed; but, if subter-

coursing in subterranean streams or percolating through the ground.<sup>64</sup> It seems to us, however, that the better doctrine is, that one has no more right to send impurities into the soil below the surface than he has into the air above the surface. One who creates or permits noxious and offensive substances upon his premises ought to take care that they do not escape either in a fluid or gaseous form into or upon his neighbor's land.<sup>65</sup> The owner of land has a right not to be injured in this manner, and an interference with this right would be a taking, if done under the power of eminent domain.<sup>66</sup>

reanean water has assumed the proportions of a stream flowing in a well-defined channel, the owner of the land through which it flows will not be authorized to divert it, pollute it, or improperly use it, any more than if the stream ran upon the surface in a well-defined course." *Tampa Water Works Co. v. Cline*, 37 Fla. 586, 20 So. Rep. 780; and see *Willis v. City of Perry*, 92 Ia. 297, 63 N. W. Rep. 727. Any interference with rights in subterranean streams by authority of law for public use would be a taking.

<sup>64</sup> *Hodgkinson v. Ennor*, 4 B. & S. 229; *Womersley v. Church*, 17 L. T. Rep. N. S. 190; *Brown v. Illius*, 25 Conn. 583; *Greencastle v. Hazelett*, 23 Ind. 186; *Sherman v. Fall River Iron Works Co.*, 5 Allen, 213. In *Greencastle v. Hazelett*, a bill was filed to enjoin the City of Greencastle from establishing a cemetery on a certain lot, on the ground that it would corrupt the waters of a valuable spring on plaintiff's land. The court held the city was the owner of the subterranean streams of its own land and would not be liable for

any damages resulting in the manner alleged in the bill. But a different view was taken by the court in a similar case in *Clark v. Lawrence*, 6 Jones Eq. 83.

<sup>65</sup> *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, reversing S. C. 26 L. R. Ch. Div. 194; *Snow v. Whitehead*, 27 L. R. Ch. Div. 588; *Sherman v. Fall River Iron Works*, 5 Allen, 213; *Brown v. Illius*, 25 Conn. 583; *Ottawa Gas Light Co. v. Graham*, 28 Ill. 73; *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 5 So. Rep. 593; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. Rep. 925; *Anheuser-Busch Brewing Ass. v. Peterson*, 41 Neb. 893, 60 N. W. Rep. 375.

<sup>66</sup> The City of Boston, in order to remove a nuisance, caused by the discharge of a sewer into a pond, was authorized to construct such canals, basins, tanks, etc., as were necessary to cleanse the pond and water flowing in the sewer, and to take land therefor. The city took land and constructed works which injured the plaintiff's wells by percolation. It was held that the act

§ 91. **Interference with natural barriers against water.**—The owner of land has a right to the protection afforded by natural barriers against the overflow of streams or the action of waves and tides.<sup>67</sup> When this right is violated in the exercise of the right of eminent domain, and damage ensues, the owner is entitled to compensation. The leading case upon this question is *Eaton v. B. M. & C. R. R. Co.*, 51 N. H. 504, which has already been given at length in the preceding chapter.<sup>68</sup> Similar decisions have been made in New York,<sup>69</sup> and Illinois.<sup>70</sup> But there is no right to the

did not authorize the nuisance and that the city was liable in tort for the injury. *Bacon v. Boston*, 154 Mass. 100, 28 N. E. Rep. 9. It would follow that if the legislature had authorized the works, as constructed, the damage would have been a taking.

<sup>67</sup> *Eaton v. B. M. & C. R. R. Co.*, 51 N. H. 504; *Robinson v. New York & E. R. R. Co.*, 27 Barb. 512; *Attorney General v. Tomline*, 12 L. R. Ch. Div. 214; 48 L. J. Ch. Div. 593; S. C. on appeal, 14 L. R. Ch. Div. 58; 49 L. J. Ch. Div. 377. In the latter case *Cotton L. J.* states the case as follows (14 L. R. Ch. Div. p. 68): "The plaintiff's land is situated a short distance from the sea, and the only land intervening between the plaintiff's land and the sea is the land of the defendant, and the complaint is that the defendant is so dealing with that land, by removing the shingle which constitutes the whole of the surface of that land, that the sea will at a time which cannot positively be stated, but within a reasonable time, undermine and destroy the land and the building of the plaintiff upon his land.

\* \* \* Then the question which we have to consider is this, whether or no that prospective or apprehended injury to the land of the plaintiff is one, which, if done, would be actionable, and one which the court ought to restrain by injunction. I am of opinion that it is." And the case was so determined in both courts.

<sup>68</sup> *Ante*, § 58.

<sup>69</sup> *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 N. Y. 436; *Robinson v. N. Y. & E. R. R. Co.*, 27 Barb. 512. In the latter case the court say: "The excavation and removal of the banks of the stream left the water to flow out of the natural channel of the creek and to overflow the plaintiff's premises. And this overflow the jury have found would not have happened but for such alteration and excavation of the natural banks of the stream. For the damages resulting from such alteration and excavation, I think this action clearly maintainable."

<sup>70</sup> *Graham v. Keene*, 143 Ill. 425, 32 N. E. Rep. 180; *Baker v. Leka*, 48 Ill. App. 353; *Dierks v. Comrs. of Highways*, 142 Ill. 197,



maintenance of an artificial barrier, such as a railroad embankment, and parties who are protected by such an embankment, have no legal ground of complaint, because openings are made therein which let in the tide.<sup>71</sup>

In this connection we call attention to an important case which arose in Milwaukee, and which seems to us to have been wrongly decided.<sup>72</sup> The plaintiff owned lots on the Milwaukee River, near Lake Michigan, upon which he had valuable improvements. The city, under authority of a special act of the legislature, made an artificial channel, 260 feet wide and twelve or fourteen feet deep, from a point near the plaintiff's property to the lake. In consequence of this opening, when the winds were from the east, the waters of the lake were driven in upon the plaintiff's property, producing very serious loss and damage. A recovery was denied, on the ground that a municipal corporation, making a great public improvement, solely for the public benefit, in the precise way authorized by the legislature and in a careful and discreet manner, was not liable for consequential damages resulting to private property therefrom. A distinction was taken between a public corporation acting for the public benefit and a private corporation executing a public work for the sake of private emolument. It was virtually conceded that if the cut had been made by an individual upon his private property for his own use, he would have been liable. But on what grounds would he have been liable? Clearly on the ground that the plaintiff had a right to have the natural barrier between his property and the lake remain in the condition in which nature had placed it. The legislature could not authorize this right to be taken from him by a public or private corporation, for any purpose, without compensation.<sup>73</sup>

31 N. E. Rep. 496; *Hotz v. Hoyt*, 34 Ill. App. 488; and see *Gulf etc. R. R. Co. v. Jones*, 63 Tex. 524; *Hocutt v. Wilmington etc. R. R. Co.*, 124 N. C. 214.

<sup>71</sup> *Koch v. Del. L. & W. R. R.*

*Co.*, 53 N. J. L. 256, 21 Atl. Rep. 284.

<sup>72</sup> *Alexander v. Milwaukee*, 16 Wis. 247.

<sup>73</sup> The correctness of this decision has been questioned. See *Pumpelly v. Green Bay Co.*, 13

§ 91a. **Miscellaneous cases as to waters.**—A railroad company constructed its road along the banks of a stream. The soil washed into the stream from the embankment and was carried down and filled up plaintiff's mill pond. Held that the company was not liable.<sup>74</sup> Where a natural stream was diverted into a highway by the plaintiff, acting as overseer of highways, where it run for a number of years, and was then turned back into its old channel, it was held the plaintiff had no ground of complaint.<sup>75</sup> Under the guise of removing obstructions from a small non-navigable stream, a city cannot widen the stream and take the property of the riparian owner without compensation.<sup>76</sup> If a railroad company, without authority, removes a levee and builds a new one, which gives way, it will be liable for the resulting damages.<sup>77</sup> Where commissioners authorized to widen, straighten and deepen a stream, through a city for drainage purposes, adopt a culvert put in by the city, which proves insufficient to vent the increased flow, the city will not be liable for damages to property flooded thereby.<sup>78</sup> Where a town bridge was destroyed by a dam, it was held that the town could maintain an action for the damage.<sup>79</sup> Where the outlet to a lake was deepened and the flow increased and so continued for twenty-four years it was held that it should be regarded the same as though the condition and flow were natural and that the same could not be interfered with for public use without compensation.<sup>80</sup> A city

Wall. 166, 180; *Armond v. Green Bay Co.*, 31 Wis. 316.

<sup>74</sup> *Trinity etc. R. R. Co. v. Meadows*, 73 Tex. 32 11 S. W. Rep. 145. It seems to be implied in *Salisbury v. Western N. C. R. R. Co.*, 91 N. C. 490, which was a similar case, that the plaintiff could recover. See also *Middlesex County v. McCue*, 149 Mass. 103, 21 N. E. Rep. 230; *Miller v. New York etc. R. R. Co.*, 125 N. Y. 118, 26 N. E. Rep. 35; *Caldwell v. East Broad Top R. R. Co.*, 169 Pa. St. 99, 32 Atl. Rep. 85.

<sup>75</sup> *Kellogg v. Thompson*, 66 N. Y. 88.

<sup>76</sup> *City of Schenectady v. Furman*, 61 Hun. 171, 39 N. Y. St. 975.

<sup>77</sup> *Hotard v. Texas & P. R. R. Co.*, 36 La. An. 450.

<sup>78</sup> *Cochrane v. City of Malden*, 152 Mass. 365, 25 N. E. Rep. 620. See also *Kansas City v. Brady*, 52 Kan. 297, 34 Pac. Rep. 884.

<sup>79</sup> *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105.

<sup>80</sup> *Lakeside Paper Co. v. State*, 15 App. Div. N. Y. 169. See also

has no right to change the course of a natural stream and cause it to run in a public street and thereby interfere with access to abutting property.<sup>81</sup> The United States may prevent such interference by a State with the sources or tributaries of a navigable stream as will impair or destroy its navigability.<sup>82</sup>

Strobl v. Bor. of Ephrata, 178 Pa. St. 50, 35 Atl. Rep. 713.

<sup>81</sup> Guerkink v. Petaluma, 112 Cal. 306, 44 Pac. Rep. 570. See Thibodaux v. Town of Thibo-

daux, 46 La. An. 1528, 16 So. Rep. 450.

<sup>82</sup> United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690.



## CHAPTER V.

### WHAT CONSTITUTES A TAKING: ROADS AND STREETS.

#### I. GENERAL QUESTIONS.—RIGHT OF ABUTTING OWNERS.

§ 91b. **Nomenclature of public ways.**—It is the design of the present chapter to consider what injury or damage to abutting property by the use or improvement of the way on which it abuts amounts to a taking within the meaning of the constitution. Under "roads and streets" all sorts of public ways by land are intended to be included, whether designated as a highway, road, street, alley, lane, place or boulevard. The word "street" is ordinarily applied to a public way in a city, town or village,<sup>1</sup> and the word "road" to a free public way in the country.<sup>2</sup> The word "highway" is often used as synonymous with either, though it has a much more comprehensive meaning, being applied to rivers, canals, lakes and railroads, as well as to roads and streets.<sup>3</sup> But the word "street" is frequently applied to a public way in the country and the word "road" to a public way in a city or village, and we shall use the words road, street, and highway, as substantially synonymous. None of the terms applied to public ways, indicate anything definite as to the rights of either the abutting owner or the public.

§ 91c. **Distinctions between rural highways and urban streets as to the extent of the public right or easement.** Many cases assert a broad distinction between the extent of the public right or easement in city streets and its

<sup>1</sup> Elliott, Roads and Streets, p. 12; *State v. Comrs. of Putnam Co.*, 23 Fla. 632, 3 So. Rep. 164; *Commissioners v. City of Jacksonville*, 36 Fla. 196, 18 So. Rep. 339.

<sup>2</sup> Elliott, Roads and Streets, 4, 5. In *Pennsylvania R. R. Co. v. Montgomery Co. Pass. R. R. Co.*,

14 Pa. Co. Ct. 88, street and road are said to be synonymous. So as to street and highway. *Case of Road etc.*, 4 S. & R. 106.

<sup>3</sup> "The term highway," says Bouvier, "is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turn-

extent in country highways.<sup>4</sup> In one of the cases cited, it is said that "there is a wide distinction between a highway in the country and a street in a city or village as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and, as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens

pike roads, railroads, canals, ferries or navigable rivers." Bouvier's Dict., Tit. highway. So also Elliott Roads and Streets, p. 1.

<sup>4</sup> This distinction is particularly discussed or emphasized in the following cases: *Western R. R. of Ala. v. Ala. G. T. R. R. Co.*, 96 Ala. 272, 11 So. Rep. 483; *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; *Kincald v. Indianapolis Nat'l Gas Co.*, 124 Ind. 577, 24 N. E. Rep. 1066, 3 Am. R. R. & Corp. Rep. 1; *Lostutter v. City of Aurora*, 126 Ind. 436, 26 N. E. Rep. 184; *Chesapeake & O. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 27 N. E. Rep. 973; *S. C. 59 Hun*, 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545; *Eels v. Am. Tel. & Tel. Co.*, 143

N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69; *Witcher v. Holland W. W. Co.*, 66 Hun, 619, 20 N. Y. Supp. 560; *Lockhart v. Railway Co.*, 139 Pa. St. 319, 21 Atl. Rep. 26; *Wood v. McGrath*, 150 Pa. St. 451, 24 Atl. Rep. 632; *McDevitt v. Peoples' Nat'l Gas Co.*, 160 Pa. St. 367, 28 Atl. Rep. 948; *Pennsylvania R. Co. v. Montgomery Co. Pass. R. R. Co.*, 167 Pa. St. 62, 31 Atl. Rep. 468, reversing S. C. 14 Pa. Co. Ct. 88, 3 Pa. Dist. Ct. 58; *Elliott Roads and Streets*, 299 et seq; *Zehren v. Milwaukee Elec. R. & L. Co.*, 99 Wis. 83. Older cases cited in support of the distinction are the following: *Bloomfield etc. Gas Co. v. Calkins*, 62 N. Y. 386; *Gas Light Co. v. Richardson*, 63 Barb. 437; *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. Rep. 105; *Sampl's Appeal*,

in their more densely populated limits."<sup>5</sup> Similar views are expressed in the other cases. But it may be doubted whether the public right or easement is any different in its legal essence, though there may be a difference in its practical exercise. The legitimate use of a public way is necessarily much greater in the city than in the country, but what constitutes a legitimate use would seem to present the same question whether it concerns a city street or a country road. There are now many city streets which were once country roads, but there does not seem to be any doubt but what they are subject to the same uses and servitudes as streets newly established.<sup>6</sup> According to Mr. Elliott the moment a country road is brought within the

116 Pa. St. 33, 8 Atl. Rep. 865; *Murray v. Gibson*, 21 Ill. App. 488; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507.

<sup>5</sup> *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25.

<sup>6</sup> In *town of Palatine v. Kreuger*, 121 Ill. 72, the defendant was prosecuted under an ordinance which forbid the removal of dirt or earth from any of the streets of the town. The defendant removed the earth under the direction of the owner of the fee and relied upon the rights of such owner as a defense. The street in question was laid out by road commissioners before the town was incorporated, that is, while the town was a rural community. The town was incorporated by a special charter which gave it the usual powers of a city or village over its streets. The court held that upon the incorporation of the town the public at once acquired the right to the enlarged

use and control of streets, usually accorded to cities and villages, and that the town had the same power over the street as though it had been laid out after incorporation. The court says: "Smith street, as appears from the stipulation, was originally a public highway laid out by the road commissioners of the town of Palatine, but when the town was incorporated the highway became a street of the incorporated town, and it is to be treated in the same way as a street laid out by the authorities of the incorporated town, and the rights and obligations of the defendant, and the rights of the public in reference to the street, are the same as if it had been so laid out by the town after it became incorporated." p. 72. In *Heiple v. East Portland*, 13 Or. 97, it is intimated that the legislature could change a country road to a city street with all the usual incidents by a simple enactment. See also *Smith v. Goldsboro*, 121 N. C. 350.

jurisdiction of a town or city, the public easement forthwith becomes enlarged and extended by operation of law.<sup>7</sup> If this is so, then something has been subtracted from the private property of the abutting owner and added to the public easement, without compensation. This is clearly contrary to the constitution and, therefore, cannot be the correct view. The public can no more take, without compensation, an easement for the urban uses of highways, than it can take, without compensation, an easement for the rural uses of highways. It follows, either that the public must have a very limited control and easement in country roads after they become city streets, or else that the easement is the same in both cases, and that the same principles are to be applied to both in determining what is a legitimate use. The latter seems to us the correct view, and the public easement may be defined as the right to use and improve the way for highway purposes as the public needs demand.<sup>8</sup> The public needs will demand a

<sup>7</sup> "There is some conflict in the cases as to whether the erection of a municipal corporation does of itself oust the jurisdiction of the county or township officers over existing highways. Our opinion is that as soon as a town or city is incorporated, the public ways, that is, ways belonging to the public and not owned by private corporations, come within the jurisdiction and control of the new public corporation, unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must of necessity change character and the servitude be much extended. This extension carries with it wider duties and greater liabilities, thus requiring an essentially different control and care." Elliott Roads and Streets,

pp. 312, 313. And again: "The change which takes place in the extent of a servitude in a public way is not effected by the act of the donee nor after acceptance by the act of the donor, but by operation of law, and in order to meet the demands of the public welfare and necessity." Same, p. 316.

<sup>8</sup> This is implied in the opinion of Peckham J. in *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69, wherein he says: "While concurring in the view that the easement in a public street in a city or village may well be greater as the actual necessities of the case are greater for sewers and gas and water pipes, yet in this case, as we have to deal with the easement in a purely country highway, it is not important to discuss how

larger use in the city than in the country. But whatever the public needs demand, in the way of legitimate highway uses, that the public have a right to enjoy. Whether a particular use or improvement is within the public right, does not depend, therefore, upon whether the highway is in the city or country, but upon the nature of the use or improvement, that is, whether it is or is not within the legitimate purposes of a highway. Nor do the authorities afford much but dicta in support of the distinction asserted between urban and rural highways. In one class of cases certain uses of a country road were held not to be within the purpose for which such roads are established, but the same courts have not held that the same uses of a city street were legitimate.\*

the easement became greater in the one case than in the other, or as to the time when the right to the enlarged use of the highway or street attaches, or the method or means by which the right to such enlarged use was attained. Density of population creates public necessities for water, light, drainage and other conveniences which do not exist in purely rural districts, and along a purely rural highway. Yet the same land might alter from a country highway to a city street, and it might be determined that there was an implied dedication of the country highway at the time the land was taken to the uses which the future village or city street might require." Mr. Pierce, in speaking of the distinction between city and country highways, says: "But as both the highway and the street are appropriated for the same general purpose, and a highway in a district sparsely inhabited at one time may, by the growth of population, become a street in a city, this dis-

tinguishment does not appear to rest upon a sound basis." *Pierce Railways*, p. 232. This doctrine has now become fully established in New York by the recent case of *Palmer v. Larchmont Electric Co.*, 153 N. Y. 231, 52 N. E. Rep. 1092, wherein the court says: "But the owner of the fee in a country highway, taken, opened and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the *Eels* case, and it is, therefore, apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require." p. 236.

\* *Western R. R. Co. v. Ala. G. T. R. R. Co.*, 96 Ala. 272, 11 So. Rep. 483; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69.



In another class of cases certain uses of city streets are declared to be legitimate,<sup>10</sup> but this is quite different from holding that the same or similar uses of country roads would not be legitimate. The cases most relied upon are those which hold that country highways cannot be used for laying down gas pipes for the conveying of natural gas.<sup>11</sup> But when these cases are examined it is found that the pipes were proposed to be laid, not for lighting the highway in question, or of furnishing gas to the occupiers of abutting property, but of conveying it past their premises to a distant city. It is not probable that the same use would be permitted of a city street. The reason of the rule that permits the use of streets for gas and water pipes would not apply to such a case.<sup>12</sup> So it was held in *Van Brunt v. Town of Flatbush*,<sup>13</sup> that a sewer could not be laid through a rural highway in a town, the fee of which was in the abutting owners, for the purpose of conveying the sewerage of an adjoining town to the ocean. But it was plainly intimated that the authorities of the town in which the highway was situated might have laid a sewer therein for the use of abutters and the

<sup>10</sup> *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; *Lostutter v. City of Aurora*, 126 Ind. 436, 26 N. E. Rep. 184; *Witcher v. Holland W. W. Co.*, 66 Hun 619, 20 N. Y. Supp. 560; *Lockhart v. Craig St. R. R. Co.*, 139 Pa. St. 319, 21 Atl. Rep. 26; *Wood v. McGrath*, 150 Pa. St. 451, 24 Atl. Rep. 682; *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, 28 Atl. Rep. 948. In *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690, which contains dicta to the effect that city streets may be used for purposes for which country roads may not, it was held that a telephone line was

not a legitimate use of a city street.

<sup>11</sup> *Bloomfield Gas Co. v. Calkins*, 62 N. Y. 386; *Calkins v. Bloomfield Gas Light Co.*, 1 N. Y. Supm. 541; *Gas Light Co. v. Richardson*, 63 Barb. 437; *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. Rep. 105; *Stumpf's Appeal*, 116 Pa. St. 33, 8 Atl. Rep. 865; *Webb v. Fuel Co.*, 16 Wkly. L. B. 121; *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 24 N. E. Rep. 1066, 3 Am. R. R. & Corp. Rep. 1.

<sup>12</sup> See *Cone v. City of Hartford*, 28 Conn. 363.

<sup>13</sup> 128 N. Y. 50, 27 N. E. Rep. 973, reversing S. C. 59 Hun 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545.

local community. These cases afford very little support for the contention that city streets may be used for purposes which would not be legitimate in the case of country roads. The only court in which it has been unequivocally adjudicated that a certain use was legitimate in the case of city streets and not legitimate in the case of country highways, is that of Pennsylvania, in which it has been held that an electric passenger railway is a legitimate use of a city or village street,<sup>14</sup> but not of a country road.<sup>15</sup>

§ 91d. What is meant by abutting owners.—The New York court of appeals has defined an "abutting owner," as one who owns land upon a street and whose title terminates at the street line.<sup>16</sup> While, strictly speaking, a lot, the title to which extends to the middle of the street, may not be said to abut upon the street, yet we believe the phrase "abutting owners," has been applied indifferently to all owners of lots or lands upon or along a street or highway, whether their title extended to the center of the street or stopped at the street line, and we shall so use the words in this treatise.<sup>17</sup>

§ 91e. (100.) Rights of abutting owners.—Light, air and access.—As we have already seen, to constitute a taking, when no title or interest passes, a private right must be impaired or destroyed.<sup>18</sup> Therefore, to determine whether certain damages, resulting to abutting property from the use or improvement of a street, amount to a taking, we must

<sup>14</sup> Lockhart v. Craig St. R. R. Co., 139 Pa. St. 319, 21 Atl. Rep. 26; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. R. & Corp. Rep. 287.

<sup>15</sup> Pennsylvania R. R. Co. v. Montgomery Co. Pass R. R. Co., 167 Pa. St. 62, 31 Atl. Rep. 468.

<sup>16</sup> In Hughes v. Metropolitan El. R. R. Co., 130 N. Y. 14, 28 N. E. Rep. 765, the court defines an "abutting lot" as follows: "It denotes a lot bounded on the side

of a public street, in the bed or soil of which the owner of the lot has no title, estate, interest or private rights except such as are incident to a lot so situated." See also Abendroth v. Manhattan R. R. Co., 122 N. Y. 1, 25 N. E. Rep. 496, 3 Am. R. R. & Corp. Rep. 309, 312.

<sup>17</sup> Elliott Roads and Streets, p. 519, et seq.; Dillon Munic. Corp., Title "Abutter."

<sup>18</sup> Ante, § 56.



inquire whether any private right has been interfered with. If yes, and the damages result from such interference, then there has been a taking, and the right to compensation follows. It thus becomes necessary to inquire what private rights, if any, an abutting owner has in, or in respect to, the street in front of his property. As these questions arise almost wholly with respect to urban property, we shall, in this discussion, have regard mainly to the conditions of urban life. While highways are established in the country largely for the accommodation of the general public in traveling from place to place, streets are laid out in cities and villages, either partly or wholly, for the purpose of affording access, light and air to the property through which they pass. As the country road of the present may become the city street of the future, it seems evident that the same rules must apply to both.<sup>19</sup> It having been always one of the recognized uses and purposes of establishing streets, to afford access, light and air to the property through which they pass, we think that with the establishment of a street there attach to the adjacent property, as appurtenant to and parcel of it, the private rights of access and of light and air.<sup>20</sup> Numerous cases, decided since the first edition of

<sup>19</sup> Ante, § 91c.

<sup>20</sup> Haynes v. Thomas, 7 Ind. 38; Tate v. Ohio & Miss. R. R. Co., 7 Ind. 479; Rensselaer v. Leopold, 106 Ind. 29; Indiana, Bloomington & Western Ry. Co. v. Eberle, 110 Ind. 542; Transylvania University v. Lexington, 3 B. Mon. 25, 27; Chicago v. Union Building Association, 102 Ills. 379, 397; Crawford v. Delaware, 7 Ohio St. 459; Jackson v. Jackson, 16 Ohio St. 163; Lexington & Ohio R. R. Co. v. Applegate, 8 Dana, 289; Lackland v. North Mo. R. R. Co., 31 Mo. 180; Thurston v. St. Joseph, 51 Mo. 510; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush, Ky. 382; Anderson v. Turbeville, 6

Coldw. 150; People v. Kerr, 27 N. Y. 188, 215; Kellinger v. 42d St. R. R. Co., 50 N. Y. 206; Story v. New York El. R. R. Co., 90 N. Y. 122; Lahr v. Met. El. R. R. Co., 104 N. Y. 268; Burlington & Mo. R. R. Co. v. Reinhackle, 15 Neb. 279; Denver v. Bayer, 7 Col. 113; and see post, §§ 114, 122. In Indiana, Bloomington & Western Ry. Co. v. Eberle, 110 Ind. 542, 545 the court say: "Whatever may be the rule of decision elsewhere, nothing is better settled in this State, than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes



this work, establish beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves.<sup>21</sup> But as all streets are established

the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, and legally adhering to, the contiguous grounds and the improvements thereon, as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted from the uses to which it was originally dedicated, or devoted to uses inconsistent with street purposes, without the abutting lot-owner's consent, until due compensation be first made according to law for any injury and damage which may directly result from such interference; nor can a street be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot-owner's property, without rendering the wrongdoer liable for such damage. \* \* \* The interest in the street which is peculiar and personal to the abutting lot-owner, which is distinct and different from that of the general public, is the right to have free access over it to his lot and buildings, substantially

in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred. In this respect, and in this only, is the interest of the abutting property-owner different in the street in front of, and beyond the line of, his lot, from that of the public." Similar views will be found expressed in nearly all the cases cited in this note.

<sup>21</sup> *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457; *Harvey v. Georgia Southern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. Rep. 783; *Barrows v. City of Sycamore*, 150 Ills. 588, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62; *Decker v. Evansville Suburban etc. R. R. Co.*, 133 Ind. 493, 33 N. E. Rep. 349; *Dantzer v. Indianapolis Union R. R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 11 Am. R. R. & Corp. Rep. 249; *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. Rep. 238, 38 N. E. Rep. 421; *Leavenworth etc. R. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. Rep. 297; *Atchison etc. R. R. Co. v. Davidson*, 52 Kans. 739, 35 Pac. Rep. 787; *Fulton v. Short Route R. R. Trans. Co.* 85 Ky. 640, 4 S. W. Rep. 332; *Hepting v. New Orleans Pac. R.*

primarily for the public use and general good, the right of the public is paramount to the right of the individual. And

R. Co., 36 La. An. 898; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. Rep. 693; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. Rep. 629; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. Rep. 1054; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 6 So. Rep. 230; Henry Gauss & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 20 S. W. Rep. 658, 7 Am. R. R. & Corp. Rep. 235; Spencer v. Metropolitan St. R. Co., 120 Mo. 154, 23 S. W. Rep. 126; Martin v. Chicago etc. R. R. Co., 47 Mo. App. 452; Wallace v. Kansas City etc. R. R. Co., 47 Mo. App. 491; Dill v. School Board, 47 N. J. Eq. 421, 20 Atl. Rep. 739; Newman v. Metropolitan El. R. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318; Abendroth v. Manhattan R. R. Co., 122 N. Y. 1, 25 N. E. Rep. 496, 3 Am. R. R. & Corp. Rep. 309; Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. Rep. 278; S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co., 3 Am. R. R. & Corp. Rep. 744; Reining v. New York etc. R. R. Co., 128 N. Y. 157, 28 N. E. Rep. 640, 5 Am. R. R. & Corp. Rep. 476; Bohm v. Metropolitan El. R. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; Hughes v. Metropolitan El. R. R. Co., 130 N. Y. 14, 28 N. E. Rep. 765; Egerer v. New York Central etc. R. R. Co., 130 N. Y. 108, 29 N. E. Rep. 95, 5 Am. R. R. & Corp. Rep. 241; Bischoff v.

New York El. R. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. Rep. 1047; Mortimer v. New York El. R. R. Co., 57 N. Y. Supr. Ct. 244, 6 N. Y. Supp. 898; Hine v. New York El. R. R. Co., 54 Hun 425, 27 N. Y. St. 303, 7 N. Y. Supp. 464; Wormser v. Brown, 72 Hun 93, 25 N. Y. Supp. 553; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; McNulta v. Rolston, 5 Ohio C. C. 330; McQuaid v. Portland & V. R. R. Co., 18 Or. 237, 22 Pac. Rep. 899, 1 Am. R. R. & Corp. Rep. 34; Johnsen v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. Rep. 594; Edmison v. Lowry, 3 S. D. 77, 52 N. W. Rep. 583; Frater v. Hamilton County, 90 Tenn. 661, 19 S. W. Rep. 233; Dooley Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327; Hart v. Buckner, 54 Fed. Rep. 925, 5 C. C. A. 1; Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. Rep. 750; Bigelow v. Ballesino, 111 Cal. 559, 44 Pac. Rep. 307; Stephenson v. Missouri Pac. R. R. Co., 68 Mo. App. 642; Beekman v. Third Ave. R. R. Co., 13 App. Div. 279, 43 N. Y. Supp. 174; Willamette Iron Works v. Oregon R. & N. Co., 26 Or. 224, 37 Pac. Rep. 1016; In re Nelson St. 182 Pa. St. 397; Pittsburg etc. R. R. Co. v. Noftsgger, 148 Ind. 101; Sherlock v. Kansas City Belt R. R. Co., 142 Mo. 172; Corby v. Chicago etc. R. R. Co.,

so the private rights of access, light and air are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway.<sup>22</sup> And as these private rights are thus subject to the right of the public to use and improve as a highway, it follows that, when such uses or improvements are made, no private right is interfered with and consequently no private property is taken. It follows also that, as these private rights are subject only to the use and improvement of the street by the public for the purpose of a highway, an interference with these rights by the use or improvement of the street for any other purpose or by any other agency, under legislative authority, is a taking of private property to the extent of such interference.<sup>23</sup> The rights of a railroad company as an owner of abutting property are the same and no greater than the rights of an individual owner.<sup>24</sup> The rights or easements of light, air and access so long as they exist are indissolubly annexed to the abutting property.

150 Mo. 457; *Jaynes v. Omaha St. R. R. Co.*, 53 Neb. 631, 74 N. W. Rep. 67; *Hamilton County v. Rape*, 101 Tenn. 222, 47 S. W. Rep. 416.

<sup>22</sup> *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457; *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629; *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. Rep. 1054; *Henry Gauss & Sons Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 20 S. W. Rep. 658, 7 Am. R. R. & Corp. Rep. 235; *Halsey v. Rapid Transit St. R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164; 26 N. E. Rep. 278; *S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744; *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 28 N. E. Rep. 640, 5 Am. R. R. & Corp. Rep. 476; *Rauenstein v. New York etc. R.*

*Co.*, 136 N. Y. 528, 32 N. E. Rep. 1047, 7 Am. R. R. & Corp. Rep. 520.

<sup>23</sup> *Shawneetown v. Mason*, 82 Ills. 337; *Winchester v. Stevens Point*, 58 Wis. 350; *Buchner v. Chicago, M. & S. P. Ry. Co.*, 60 Wis. 264; *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278; *S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744; *Reining v. New York etc. R. R. Co.*, 128 N. Y. 157, 28 N. E. Rep. 640, 5 Am. R. R. & Corp. Rep. 476; *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Or. 224, 37 Pac. Rep. 1016; and see § 110 et seq.

<sup>24</sup> *Appeal of Philadelphia etc. R. R. Co.*, 2 Walker's Pa. Supm. Ct. 291, affirming 1 Montg. Co. L. Rep. 129.

They may be released or extinguished, in whole or in part, but they cannot be reserved or conveyed, or exist separate from the property to which they pertain, so that the property shall be owned by one and the easements by another.<sup>25</sup>

§ 91f. **Origin and basis of the rights or easements of access, light and air.**—The existence of this private right in all cases may be reasoned out as follows: When the owner of a tract of land lays the same out into lots and streets, and sells the lots, the purchasers of such lots acquire as appurtenant thereto a private right of way and access over the streets.<sup>26</sup> This private right arises without any express

<sup>25</sup> *Pegram v. New York El. R. Co.*, 147 N. Y. 135, 41 N.E. Rep. 424; *Kernochan v. New York El. R. Co.*, 128 N. Y. 559, 29 N. E. Rep. 65; *Pappenheim v. Railway Company*, 128 N. Y. 436, 28 N. E. Rep. 518. In the *Kernochan Case* the court says: "The easements of an abutting owner, invaded, are appurtenant to his premises, and, in the nature of things, they are indissolubly annexed thereto, until extinguished by release or otherwise. They are incapable of a distinct and separate ownership."

<sup>26</sup> *Thurston v. St. Joseph*, 51 Mo. 510; *Pratt v. Buffalo City Ry. Co.*, 19 Hun 30; *Dubuque v. Malony*, 9 Ia. 450; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Matter of Lewis Street*, 2 Wend. 472; *Livingston v. Mayor etc. of New York*, 8 Wend. 85; *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 165; *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. Rep. 178; *Newell v. Sass*, 142 Ill. 104, 31 N. E. Rep. 176; *Indianapolis v. Croas*, 7 Ind. 9; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Schneider v. Jacob*, 86 Ky. 101, 5 S. W. Rep. 350;

*White v. Flannigan*, 1 Md. 542; *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 Atl. Rep. 915; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. Rep. 279; *McLemon v. McNeley*, 56 Mo. App. 556; *Dill v. School Board*, 47 N. J. Eq. 421, 20 Atl. Rep. 739; *In re St. Nicholas Terrace*, 143 N. Y. 621, 37 N. E. Rep. 635; *Matter of Ethel St.*, 3 Misc. 403, 24 N. Y. Supp. 689; *Moore v. Carson*, 104 N. C. 43, 10 S. E. Rep. 689; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. Rep. 717; *Ferguson's App.* 117 Pa. St. 426, 11 Atl. Rep. 885; *Dobson v. Hohenadel*, 148 Pa. St. 367, 23 Atl. Rep. 1128; *Hobson v. City of Philadelphia*, 150 Pa. St. 595, 24 Atl. Rep. 1048; *Clark v. Providence*, 10 R. I. 437; *Thaxter v. Turner*, 17 R. I. 799, 24 Atl. Rep. 829; *Johnsen v. Old Colony R. Co.*, 18 R. I. 642, 29 Atl. Rep. 594; *Wolf v. Brass*, 72 Tex. 133, 12 S. W. Rep. 159; *Barbour v. Lyddy*, 49 Fed. Rep. 896; *Fitzgerald v. Barbour*, 55 Fed. Rep. 440, 5 C. C. A. 180; *Rainey v. Herbert*, 55 Fed. Rep. 443, 5 C. C. A. 183; *Bennett v. Chicago etc. R. R. Co.*, 73 Fed. Rep. 696.

grant, and in the absence of any statute.<sup>27</sup> The law presumes that the parties had in mind the advantages to be derived from the use of the proposed streets, and implies a right to such use as a part of the grant. This position is not open to controversy, and is as good sense as it is good law. If several persons, owners of distinct parts of a tract, should join in laying the same out into streets and lots, the result would be the same. The law would imply the grant of mutual easements of way and access, appurtenant to the respective lots, and this, as before, in the absence of any statute or express mention of such easements. These private rights or easements are the presumed, as well as the real, consideration for the grant or dedication of a part of the tract to public use. These private rights remain the same whether the streets are accepted by the public or not.<sup>28</sup> If, instead of making a gift of the streets to the public, the proprietors should voluntarily grant the streets for a consideration agreed upon and paid by the public, it would still be true in fact, and therefore presumed by law, that, in fixing the consideration to be paid, the parties had in mind the advantages to be derived from the use of the streets. That is, the consideration to each proprietor would be, the right to make use of the streets in connection with his lots, and a certain sum of money paid. The first part of this consideration would be utterly fallacious, unless the right in question is protected by the law of the land the same as any other right. To make the right a part consideration of the grant, and then to allow the public to invade or destroy it at pleasure, would be a fraud which the law will neither impute nor allow.<sup>29</sup> Therefore, in the case of such a grant, there arises by operation of law a private

<sup>27</sup> *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 145; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744; *Hughes v. Met. El. R. R. Co.*, 130 N. Y. 14, 28 N. E. Rep. 765.

<sup>28</sup> *Johnsen v. Old Colony R. R. Co.*, 18 R. I. 642, 29 Atl. Rep.

594; *Clark v. Providence*, 10 R. I. 437.

<sup>29</sup> "The claim made that the owner of property taken for a street, obtains, through the award of the commissioners, full compensation for his property, is unfounded, unless the benefits for which he is assessed are in-

right to use the streets in connection with the lots of each proprietor, which is as inviolable as any other right of property. If the streets, instead of being established by dedication or voluntary grant, are acquired by forced sale or condemnation, how is the matter changed? The price to be paid, instead of being agreed upon, is ascertained in some mode provided by law. The transfer of title is accomplished by legal proceedings, instead of a deed of the parties. In fixing the price to be paid to each proprietor, the advantages to be derived from the use of the street or streets are taken into consideration.<sup>30</sup> Generally, he actually pays a fixed price for these advantages, in the form of an assessment of benefits upon his remaining property.<sup>31</sup>

violably secured to him by such proceedings. Any other construction of the statute would render it an efficient engine of fraud and injustice. An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been in-

augurated which resembles more nearly legalized robbery than any other form of acquiring property." *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268, 290, 291.

<sup>30</sup> "The benefits to be received by a person whose land is taken by the public for a road are a part of the consideration for the release of the land, or its condemnation for a road, and when once vested in him, or he becomes entitled thereto, they are as much his property as the land itself, and neither the State nor any of its subordinate agencies can deprive him of them, except in the manner pointed out by the constitution, and that has not been done in this case." *Pearshall v. Board of Supervisors*, 74 Mich. 558, 42 N. W. Rep. 77.

<sup>31</sup> In *Wormser v. Brown*, 72 Hun 93, 25 N. Y. Supp. 553, it is held that an assessment of benefits must be regarded as a payment for the privileges of light, air and access afforded by the street. A different view is taken by the Supreme Court of New Jersey in *State v. City of Elizabethtown*.

Now, it would be the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid or of an assessment of benefits, unless those advantages are secured to him by a clear title. The result of every such proceeding, therefore, is that there is created and attached to the lot or tract of each proprietor through which the street runs, a private right, independent of the public easement, to use the street for the purposes of access to the lot and of outlet to the general system of highways. The proceedings have precisely the same effect as a voluntary grant by the several proprietors, and, in case of a voluntary grant, the law will imply a transfer of mutual easements of way and access appurtenant to the several lots.<sup>32</sup>

beth, 54 N. J. L. 462, 24 Atl. Rep. 495, wherein the court says: "It is assumed by counsel for prosecutrix that, because the prosecutrix was assessed for a benefit resulting from the opening of this street, peculiar to herself, she got a vested right in the continued existence of the street, of which she could not be stripped without compensation. But this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public. The privilege of using the street was shared by each member of the community. It may not have been of the same value to each member of the community, but the right to use the street was in each citizen the same. It was exclusively a public right, put under the control of the representatives of the public. It was subject to alteration or abolition, when, in the judgment of

those to whom the public interests were confided, these interests demanded such action. The assessment of benefits is presumed to be based upon the recognized power of the State and its agencies to modify or destroy the improvement. The attitude of those who have been assessed for peculiar benefits differs in no respect from that of any other citizen in regard to this control of the public over a public right." The case was affirmed in the court of errors and appeals, but without affirming these views. 55 N. J. L. 337, 26 Atl. Rep. 339.

<sup>32</sup> "The proceedings by which land is acquired by the exercise of the right of eminent domain amount to a statutory conveyance of the same to the public or the corporation, and there is no distinction between such a conveyance and a voluntary conveyance made for public use. Where property is acquired for public use by proceedings in in-

The right to light and air from over the space occupied by the street arises in the same way and stands upon the same footing as the right of access. The reasoning advanced and authorities cited in this section fully establish the proposition that, when a highway is established, and irrespective of the mode by which it is established, or of the interest acquired by the public in the soil, there is attached to the abutting property a right to receive light and air from the space above the surface of the street. The New York Court of Appeals, in speaking of the origin of these easements of light, air and access, says: "The plaintiff's easements, or rights in the nature of easements, are not created by grant or covenant. They arise, we think, from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges, and upon a contract between the public and the property owner implied, from all the circumstances, that the street shall be kept open as a public street, and shall not be diverted to other and inconsistent uses. There is some analogy, we think, between the rights of abutting owners as against the public, and those acquired by the public against private persons, in streets or highways by dedication. The public acquires, upon acceptance of a dedication by the owner of land of a highway over the same a perpetual easement therein for a highway, although there may be no deed or writing or covenant, and no formalities attending the transaction, such as is required for the creation of an easement at common law. Here the State has dedicated the streets in the city of New York to be public streets. The abutting owners have acted upon the dedication, and upon the pledge of the public faith that they shall continue to be open public streets forever. It would be gross injustice to deprive them of the advantages intended, without compensation. The dedication ought to be, and

vitum, the statute which authorizes the acquisition constitutes the contract between the citizen and the public, and where the interest has once been acquired

it cannot be changed or enlarged without further compensation." *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 172.



we think is, irrevocable.”<sup>33</sup> The existence of these private rights and easements is, therefore, entirely independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street, whether a fee or less.<sup>34</sup> These views are fully

<sup>33</sup> *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744, 753, 754. And in *Hughes v. Met. El. R. R. Co.*, 130 N. Y. 14, 28 N. E. Rep. 765, the same court says: “These street rights of an abutting owner are not originated by grant, in terms, of such incidental rights, and their existence need not be established by conveyances in specific terms, conveying such right, for there are none; nor by adverse possession by an abutting owner, for the right is incapable of such possession as against the city. The private rights appurtenant to abutting lots arise by operation of law from contiguity, like rights for the adjacent and subjacent support of land, and their existence is presumed.” The views of the text are also sustained by the reasoning in *In re Nelson Street*, 182 Pa. St. 397, 402, 403.

<sup>34</sup> “What are the rights of a lot-holder in reference to the adjacent streets and alleys? The owner in fee of a tract of land may have it surveyed into town lots, streets and alleys, and, without selling any of the lots or acknowledging the plat, he may destroy the survey and vacate the streets and alleys. But if he convey away any of the lots, the right of the free use of the ad-

jacent streets will pass to the grantees as appurtenant to their lots; and such grantees will not only have a servitude or easement in the adjacent streets and alleys as appurtenant to the lots, but the conveyance itself would be a dedication of the streets and alleys to the public as well as to the private use of the lots. This would be the result without any statutory dedication by acknowledging and filing the plat with the county recorder. The effect of a statutory dedication, however, is precisely the same. It vests in the adjacent lot-holder the right to the use of the streets as appurtenant to his lot, and this easement is as much property as the lot itself. It is a property interest, independent of the right of the public highways, and the lot-holder is as much entitled to protection in the enjoyment of this appurtenant easement as he is in the enjoyment of the lot itself. Hence, whatever injures or destroys this easement, is to that extent a damage to the lot. So if in grading a street it be raised so high as to throw the surface water back upon the lot, or prevent a free access to the street; or if the street be excavated so low as to render the easement of no use to the lot, the lot-holder is thereby damaged to the extent

sustained by the opinion in *Story v. New York El. N. Co.*<sup>35</sup>

§ 91g. Further as to the right to light and air.—The existence and nature of this right are very ably expounded in an opinion of the Court of Errors and Appeals of New Jersey, which is worthy of special attention.<sup>36</sup> Complainant owned land abutting on the Morris Canal, and had erected a building with windows overlooking the canal. The fee of the right of way occupied by the canal was vested in the Canal Company for public use as a canal. The Canal Company authorized the defendant to erect a building over the canal and adjacent to complainant's lot, the effect of which would be to close up the windows in complainant's building and completely cut him off from light, air or access over the canal. The court held, fourteen judges concurring, that, though the canal was a public highway and the fee was vested in the company, yet the complainant had a right to light and air which, though subordinate to the use of the land as a public highway, was paramount to any other use, and that, as the building was not for the improvement of the canal as a highway, its erection should be enjoined. The court say:

"There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and

of the loss of such easement." *Thurston v. City of St. Joseph*, 51 Mo. 510. And see *Post*, § 122.

<sup>35</sup> 90 N. Y. 122. Also by numerous cases decided by the same court since the first edition. See especially *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278; *S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744; *Hughes v. Met. El. R. R. Co.*, 130 N. Y. 14, 28 N. E. Rep. 765; and cases cited in § 91e,

note 21. The reasoning and conclusions of this section have been fully adopted and approved in *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103, and *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279, 6 So. Rep. 230. See also *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629.

<sup>36</sup> *Barnett v. Johnson*, 15 N. J. Eq. 481, 487.

scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air.

"In the first place, has not the adjacent owner upon the 'alta regia via,' the ordinary public highway, of common right the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns and cities in this country and in all others, now and at all times past, been built upon this assumed right of adjacency? Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?

"When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration, except that it is a public highway and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. What must be the consequence, to permit the accidental owner of a part or the whole of the road-bed to wall up or throw a thin curtain in front of the adjacent buildings or by any other contrivance shut out from them the light and air? Suppose the owner of the fee should try the experiment to the east of the complainant's house, and wall up Broad street, would it be tolerated for a moment, or, if enforced, would it not soon turn our streets into tunnels, and seal up cities in darkness?

"If it be said that there are no cases sustaining this right, so there are none establishing this right, to light and air at all, or to the right of passage. It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it

would set at defiance all legislative enactment and all judicial decisions. It is the mode by which the sovereign power, in the exercise of its eminent domain, since land has become the object of private ownership, 'ab imo usque ad cælum,' at the same time that it creates a right of passage, opens up and reserves to all, as the increasing density of the population demands it, the use of the common elements of light and air. We cannot conclude otherwise than that a right so essential, so universal in its exercise in all time and among all nations, exists, not, as was said in the case of *Gough v. Bell*, 2 Zab. 441, by a common law local to New Jersey, but by a law common to the whole civilized world."

This case anticipates the principle upon which compensation was at last secured in the elevated railway cases in New York.

§ 91h. To how much of the street the rights or easements of light, air and access extend.—It would seem just that these rights or easements should extend to so much of the street as is necessary for their reasonable enjoyment. They undoubtedly extend to the full width of the street, at least, as respects light and air.<sup>37</sup> Some cases would limit the easements of light and air to the space in front of the property in question,<sup>38</sup> but it may be doubted whether these easements do not extend so far on either side of a lot as is necessary to prevent any erection or use which will obstruct the access of light and air to the lot.<sup>39</sup> The extent and limits of the right of access cannot well be defined. But, in general, it includes the right to use the street as an outlet from the abutting property to a connecting highway, by any mode of travel or conveyance appropriate to a high-

<sup>37</sup> *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629; *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. Rep. 1054; *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; *Metropolitan W. S. El.*

*R. R. Co. v. Springer*, 171 Ills. 170; *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Or. 224, 37 Pac. Rep. 1016.

<sup>38</sup> *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629.

<sup>39</sup> In *Wilson v. New York El.*

way; also, the right to use the street in front of the property, in connection with the use and enjoyment of the property, in such manner as is customary or reasonable.<sup>40</sup> In one of the cases cited it is said: "We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner, at the point where it abuts upon the street, the property right of the lot owner is invaded, and he may recover. To illustrate this proposition, if a street were fully obstructed on either side of one's lot, so that the lines of the lot could not be reached, access would be denied to the lot owner, though the street in front of his lot had upon it no obstruction. The property rights of the lot owner, as against the public, are coterminal with the lines of his lot, but that property right may be obstructed, and its uses defeated, by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be, and is, a remedy."<sup>41</sup>

§ 91i. **Has the abutter other rights or easements than those of light, air and access?**—This question has been answered in the negative in New York. In one case it is said: "The property rights of an abutting owner consist of easements of light, air and access. There are no easements of privacy or quiet, or other easements than those mentioned, for which compensation can be claimed."<sup>42</sup> In another case

R. R. Co., 9 Misc. 657, 30 N. Y. Supp. 547, it is held that the easements are not confined to the space immediately in front of the lot.

<sup>40</sup> *Dantzer v. Indianapolis Union R. R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 11 Am. R. R. & Corp. Rep. 249; *Harvey v. Georgia Southern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. Rep. 783; *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. Rep. 288, 38

N. E. Rep. 421; *Atchison etc. R. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. Rep. 842; *Johnson v. Old Colony R. R. Co.*, 18 R. I. 642, 29 Atl. Rep. 594; *In re Nelson St.* 182 Pa. St. 397; *Post*, § 134.

<sup>41</sup> *Dantzer v. Indianapolis Union R. R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 11 Am. R. R. & Corp. Rep. 249.

<sup>42</sup> *Bischoff v. New York El. R. R. Co.*, 138 N. Y. 257, 33 N. E. Rep.

it was held that in estimating the just compensation to be made for injury to the abutter's rights by an elevated railroad, nothing could be allowed for noise, loss of privacy, or obstructing the view of the premises from the opposite side of the street.<sup>43</sup> Other cases support the right of the abutter to an unobstructed view, or right of prospect, as it is sometimes called, which would include both an unobstructed view from the premises and an unobstructed view of the premises from any part of the street.<sup>44</sup> An abutter has no greater right to use the street in front of his property than any other member of the public, except in connection with his abutting property.<sup>45</sup>

§ 91j. **Rights of abutting owners as adjoining proprietors.**—The public, as owner of the street, is in fact an adjoining proprietor, whether it owns the fee or only an easement. Has the public any greater right than an individual proprietor, or does it hold the street subject to the same limitations and conditions that attach to private ownership? We think the latter. In the use of the street the public is subject to the same limitations that an individual would be who held the street as his private property.<sup>46</sup> The abutting owner has the same rights with respect to the

1073; *Seaside & B. B. R. R. Co. v. South Reformed Dutch Church*, 83 Hun 143, 31 N. Y. Supp. 630.

<sup>43</sup> *Messenger v. Manhattan R. R. Co.*, 129 N. Y. 502, 29 N. E. Rep. 955.

<sup>44</sup> *Jaynes v. Omaha St. R. R. Co.*, 53 Neb. 631, 74 N. W. Rep. 67; *Dill v. School Board*, 47 N. J. Eq. 421, 20 Atl. Rep. 739; *Codman v. Evans*, 5 Allen, 308. Judge Dillon says: "There seems to be no good reason why such easement should not include also the right (within reasonable limits) to an unobstructed view; and hence the right to insist on the removal of an obstruction in

the street which interferes materially and in an unusual manner with the abutter's prospect, even though light, air and travel be not materially interfered with by such obstruction." 2 Dill. Munic. Corp., p. 889, note 2. In *Codman v. Evans*, 5 Allen, 308, 311, the court says that an abutter is entitled "to have the whole space occupied by a street open from the soil upwards for the free admission of light and air and the prospect unobstructed from any point."

<sup>45</sup> *Montgomery v. Parker*, 114 Ala. 118.

<sup>46</sup> "In the control and improvement of its thoroughfares

use of the street, that he has with respect to the use of any other adjacent property. Consequently, he has a right to the support of his soil by that of the street, a right to the exclusive possession of his inclosure as against encroachments from the street, a right not to be injured by any interference with the flow of surface water or running streams caused by the use of the street which would be actionable if made by an individual, and, generally, a right not to be injured by any unreasonable use of the land which forms the street.<sup>47</sup> These rights, unlike those of access and frontage, are absolute and paramount in the individual, and the public must so use and improve the streets as not to interfere with such rights, or else make "just compensation" for the damages occasioned by such interference.<sup>48</sup>

It is evident that these rights exist in the abutting owner, unless they are taken or acquired by the public when the street is established. They always exist with respect to adjoining property, unless they have been expressly reserved or granted in favor of other property. These rights are never expressly granted, released or condemned when a street is established. The land alone is taken, or granted,

for public use the city has the same rights and powers as a private owner has over his own land and is subject to the same liabilities. It would be liable for damages caused to plaintiff's property by grading the avenue and street, just as a private owner of the soil over which they were laid would have been liable when improving it for his own use; and the right to inflict damage beyond that which a private owner might have inflicted without liability did not exist." *Munger v. City of St. Paul*, 57 Minn. 9, 58 N. W. Rep. 601. To same effect: *Stearn's Exrs. v. City of Richmond*, 88 Va. 992, 14 S. E. Rep. 847, 6 Am. R. R. & Corp. Rep. 247; *Rice v. City of Flint*,

67 Mich. 401, 34 N. W. Rep. 719; *Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. Rep. 84; *City of New Westminster v. Brighthouse*, 20 Duvall 520; and many cases cited in the following sections.

<sup>47</sup> Post, §§ 101-104, 151. "The rights of the public in property are to be governed by the same rules of law as the rights of individuals, and the maxim *sic utero tuo ut allenum non laedas*, applies with equal force in the one case as in the other." *Stone v. Augusta*, 46 Me. 127.

<sup>48</sup> Same; and §§ 151, 589. In *Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. Rep. 84, the court, in speaking of one of these rights, says: "This right of the

or dedicated, as the case may be. But land is always understood to have attached to it these universal rights and obligations relating to its use and enjoyment. When the public take land for a street in invitum, why should they be held to have acquired by implication something which they did not ask for? Why should a grant or dedication of land to the public, for a particular use, be held to have vested in the public more than a grant of the same land, for the same use, to an individual, would vest in him? The use of the land for a street does not necessarily require that these rights of support, etc., should be in the public. It is always possible and practicable to improve a street without interfering with such rights. It is vastly more for the public interest that the public should occasionally incur increased expense in making improvements, to avoid interfering with such rights, than that the public should in all cases be compelled to pay for the loss of such rights when a street is established. It has been said, in some cases, that a jury or other tribunal for assessing damages, when a street is laid out, take into consideration the possibility of future damage by improving the street, and increase their allowance accordingly.<sup>49</sup> We think the fact is otherwise, but the impossibility of forming an accurate or even approximate estimate of such damages is sufficient to rebut any presumption of their having been included in the assessment. Who can estimate what the needs of the public will require, or the whims of public officers suggest? To attempt to include such damages is to send the jury into the realm of pure speculation. The more reasonable, the more practicable and the juster view is that such damages are not the subject of assessment in such cases.<sup>50</sup> While these views as to the rights of abutting owners do not accord with all the decided cases—no views can do that—they are supported, if not by the more numerous, at least by the later and better-reasoned cases.<sup>51</sup> We shall go more fully into the decisions in the

lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence."

<sup>49</sup> See authorities cited post, § 97, note 86.

<sup>50</sup> Post, chap. xxiv.

<sup>51</sup> This section is quoted and



following sections in the treatment of the separate rights to which we have referred in this section.

§ 91k. When the fee of streets is in the public, the title is in trust for street uses only.—Though the fee of a street is in the public, yet it is not an absolute, but only a qualified or conditional fee.<sup>52</sup> The public, whether represented

approved in *Stearns' Ex'r v. City of Richmond*, 88 Va. 992, 14 S. E. Rep. 847, 6 Am. R. R. & Corp. Rep. 247.

<sup>52</sup> *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Wis. 32; *People v. Kerr*, 27 N. Y. 188. Though the city of New York has the fee, "still in my opinion the interest or estate thus conferred upon the city is limited and not absolute, limited by the purposes of the grant, notwithstanding the broad language of the statute." *Id.* See *Abenbroth v. Manhattan Ry. Co.*, 52 N. Y. Supr. Ct. 274. In *Matter of Gilbert Elevated Ry. Co.*, 38 Hun 437, 448, 452-3, the court approve the following language from the commissioners' report: "The city takes the fee in terms, but only for one specified purpose, viz., in trust to keep the land open as a public street. The fee is not an absolute, unqualified, unconditional fee. The city cannot sell or convey it, or encumber it in any way, or consent that it shall be encumbered. It cannot build upon it, or permit others to do so. The land could not be sold for the debts of the city, for its estate is only a trust estate. The act provides what the city can do with the fee, and that is to keep it open as a public street, and that is all the city can do with it and is all the

right the public has taken away from the original owner. The whole duty, power and trust of the city, in the fee, is to keep it open, the fee being taken because the city can thereby better perform its duty and its trust in that regard than if any other quality of estate were taken.

\* \* \* Has not every lot-owner a special private right of property in the light, air and access afforded him by an open street? We think he has, without reference to whether he has a title to the land in the street or not. If he has not, and the arguments of the petitioner's learned counsel be correct, the legislature may, without compensation to the lot-owner, empower the petitioners to build solid masonry walls within six inches of the lot-owner's front, and two, three or more stories in height, so long as the only use made of the structure is to carry the public. Or, it may empower some other private corporation to build some similar structure, from side to side of the street, for a market or some other purpose, by simply declaring it to be for the public use. We find, as matter of fact, that the light, air and access of the complainant's lots are interfered with and taken, to an appreciable extent,

by city, State or county, holds the fee in trust for public use as a street, and for no other purpose,<sup>53</sup> and when the

by the petitioner's acquisition of the lands in question, and, as matter of law, that these are private property rights, and, as easements, appurtenant to the lots fronting on the street, or otherwise, belonging to the abutting property owners, whether the lot owners have or have not title to the land itself in the street."

<sup>53</sup> *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82; *Stanley v. Davenport*, 54 Ia. 463, 468; *People v. Kerr*, 27 N. Y. 188; *Carter v. Chicago*, 57 Ills. 283; *Chicago v. Wright*, 69 Ills. 318; *Haskell v. Denver Tramway Co.*, 23 Col. 60, 46 Pac. Rep. 121; *Imlay v. Railroad Co.*, 26 Conn. 256; *Kreigh v. Chicago*, 86 Ills. 407; *City of Morrison v. Hinkson*, 87 Ills. 587, 589; *Smith v. McDowell*, 148 Ills. 51, 35 N. E. Rep. 141; *Field v. Barling*, 149 Ills. 556, 37 N. E. Rep. 850, 10 Am. R. R. & Corp. Rep. 707; *Barrows v. City of Sycamore*, 150 Ills. 588, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62; *Gregsten v. Chicago*, 40 Ills. App. 607; *Hibbard v. Chicago*, 59 Ills. App. 470; *Chicago General R. R. Co. v. Chicago City R. R. Co.*, 62 Ill. App. 502; *Bateman v. City of Covington*, 90 Ky. 390, 14 S. W. Rep. 361, 3 Am. R. R. & Corp. Rep. 508; *New Orleans etc. R. R. Co. v. City of New Orleans*, 44 La. Ann. 748, 11 So. Rep. 77; *St. Paul v. Chicago etc. R. R. Co.*, 63 Minn. 330, 63 N. W. Rep. 267, 65 N. W. Rep. 6491, 68 N. W. Rep. 458. *Theobald v. Louisville*

*etc. R. R. Co.*, 66 Miss. 270; *Jaynes v. Omaha St. R. R. Co. (Neb.)*, 74 N. W. Rep. 67; *Story v. New York El. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744; *Lawrence v. New York*, 2 Barb. 577; *Strader v. Cincinnati*, 1 Handy 446; *Coalville Pass. R. R. Co. v. Wilkes-Barre Southside R. R. Co.*, 5 Luzerne Leg. Reg. Rep. 340; *Humer v. Mayer*, 1 Humph. 403; *Mayor v. Brown*, 9 Heisk. 1; *Smith v. Railroad Co.*, 87 Tenn. 626, 630; *Kimball v. City of Kenosha*, 4 Wis. 321, 330; *Goodall v. Milwaukee*, 5 Wis. 32; *Pool v. Falls Road Elec. R. R. Co.*, 88 Md. 533, 41 Atl. Rep. 1069; *Burlington v. Penn. R. R. Co.*, 56 N. J. Eq. 259, 38 Atl. Rep. 849; *Lake Shore etc. R. R. Co. v. Elyria*, 14 Ohio C. C. 48. "The grant is expressly upon trust (though dedicated or confiscated), for a public purpose, that the lands may be appropriated and used forever as public streets. \* \* \* The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant. Whatever may be the quantity or the quality of the estate of the city of New York in its streets, that estate is essentially public and not private property, and the city, in holding it, is the agent and trustee of the public and not a private owner

use ceases the fee reverts to him from whom it was acquired, unless otherwise provided by statute.<sup>54</sup> It has sometimes been supposed that the public might have such an absolute fee as would authorize it to make any use of the street it saw fit irrespective of the abutting owners.<sup>55</sup> But we know of no instance of such a fee, nor do we see how it would be possible. However absolute the fee of the public may have once been, its devotion of the land to street uses and the express or implied invitation to abutters to improve their property with reference to the street, would give rise to mutual rights and obligations which could not be abrogated at the will of either party. By acting upon the invitation to use the land as a street, the abutters would acquire a right to have the space kept open as a street and to enjoy light, air and access therefrom.<sup>56</sup>

§ 911. Ownership of the fee of streets and distinctions based thereon.—There is great confusion and conflict in the authorities arising out of considerations based upon the fee of streets. Thus the New York decisions hold that the abutting owner is entitled to compensation when an elevated railroad is constructed in front of his property, whether he owns the fee of the street or not,<sup>57</sup> but as to surface

for profit or emolument." *People v. Kerr*, at 197 (27 N. Y. 188). It follows that a municipality cannot grant the use of streets for private purposes. *Laing v. Americus*, 86 Ga. 758, 13 S. E. Rep. 107, 4 Am. R. R. & Corp. Rep. 228; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. Rep. 141; *Hibbard v. Chicago*, 59 Ill. App. 470; *State v. Berdetta*, 73 Ind. 185; *St. Paul v. Chicago etc. R. R. Co.*, 63 Minn. 330, 63 N. W. Rep. 267, 65 N. W. Rep. 649, 68 N. W. Rep. 458; *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. Rep. 898, 8 Am. R. R. & Corp. Rep. 391; *Herrick v. Cleveland*, 7 Ohio C. C. 470; *Hibbard v. Chicago*, 173 Ill. 91; *Snyder v.*

*Mt. Pulaski*, 176 Ills. 397, 52 N. E. Rep. 62; *Pennsylvania R. R. Co. v. Chicago*, 181 Ills. 289.

<sup>54</sup> *Gebhart v. Reeves*, 75 Ills. 301; *Helen v. Webster*, 85 Ills. 116; *United States v. Harris*, 1 Sumner 21. But in Kansas it is held that the fee reverts to the abutting owner. *Showalter v. So. Kan. R. R. Co.*, 49 Kan. 421, 32 Pac. Rep. 92. See generally *El-lott Roads & Streets*, pp. 670, 671.

<sup>55</sup> See 2 Dill. Munic. Corp. § 704.

<sup>56</sup> *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744.

<sup>57</sup> *Story v. New York El. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met-*

railroads of all kinds, award him compensation if he owns the fee and deny him compensation if he does not.<sup>58</sup> Commercial railroads and even horse railroads are held not to be legitimate street uses, but if the abutter does not happen to own the fee, he can get no compensation, however much he may be damaged. In the elevated railroad cases he gets compensation, because his easements are interfered with by a use foreign to the purposes of a highway. But in case of the commercial railroad he cannot get compensation though the same easements are interfered with by a use also inconsistent with street purposes and differing only as to the structure placed in the street. It has accordingly been held in New York that, in a proceeding to condemn the fee of a street, the abutter is entitled to substantial damages.<sup>59</sup> So in Tennessee it is held that the abutting owner may recover compensation for a steam dummy railroad in the street in front of his property if he owns the fee, but otherwise if the fee is in the public.<sup>60</sup> Similar distinctions are made in other States.<sup>61</sup>

On the other hand, many recent cases question or repudiate distinctions based upon the ownership of the fee, as respects the uses which the public may make of the soil or

ropolitan El. R. R. Co., 104 N. Y. 268; Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. Rep. 278; S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co., 3 Am. R. R. & Corp. Rep. 744.

<sup>58</sup> Fobes v. Rome etc. R. R. Co., 121 N. Y. 505, 24 N. E. Rep. 919, 3 Am. R. R. & Corp. Rep. 182; Williams v. New York Cent. R. R. Co., 16 N. Y. 97; Craig v. Railroad Co., 39 N. Y. 404; Kellinger v. Railroad Co., 50 N. Y. 206.

<sup>59</sup> City of Buffalo v. Pratt, 131 N. Y. 293, 30 N. E. Rep. 233, 6 Am. R. R. & Corp. Rep. 499.

<sup>60</sup> East End St. R. R. Co. v. Doyle, 89 Tenn. 747, 13 S. W. Rep.

936, 2 Am. R. R. & Corp. Rep. 747; Smith v. Railroad Co., 87 Tenn. 626, 11 S. W. Rep. 709; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705.

<sup>61</sup> Moses v. Pittsburgh etc. R. R. Co., 21 Ills. 516; Murphy v. Chicago, 29 Ill. 279; Indianapolis etc. R. R. Co. v. Hartley, 67 Ills. 439; Milburn v. Cedar Rapids, 12 Iowa, 246; Kucherman v. C. C. & D. R. R. Co., 46 Iowa, 366; Cox v. Louisville, etc. R. R. Co., 48 Ind. 178; Phipps v. West Maryland R. R. Co., 66 Md. 319; Western Union Tel. Co. v. Williams, 2 Am. R. R. & Corp. Rep. 258; Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577,

the right of the abutter to compensation.<sup>62</sup> The opinions

24 N. E. Rep. 1066, 3 Am. R. R. & Corp. Rep. 1; Florida So. R. Co. v. Brown, 23 Fla. 104; Post, §§ 113-115.

<sup>62</sup> *McQuade v. Portland etc. R. R. Co.*, 18 Or. 237, 22 Pac. Rep. 899, 1 Am. R. R. & Corp. Rep. 34; *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279, 6 So. Rep. 230; *Fulton v. Short Route R. Trans. Co.*, 85 Ky. 640, 4 S. W. Rep. 332; *Hepting v. New Orleans Pac. R. R. Co.*, 36 La. An. 898; *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629; *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 630, 9 Am. R. R. & Corp. Rep. 103; *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 438, 18 S. E. Rep. 604; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690; *Lamm v. Chicago etc. R. R. Co.*, 45 Minn. 71, 47 N. W. Rep. 455; *Improvement Co. v. Hoboken*, 36 N. J. L. 540; *Van Horne v. New York Pass. R. R. Co.*, 48 N. J. Eq. 332; *Halsey v. Rapid Transit R. R. Co.*, 47 N. J. Eq. 380; *Barney v. Keokuk*, 94 U. S. 324; *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327; *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Or. 224, 37 Pac. Rep. 1016. In the first case cited Thayer, C. J., speaking for the court, says: "Too much importance, it seems to me, has been attached to the question of ownership of the fee in the street. \* \* \* The use of the land as a street includes

practically its entire beneficial interest. There is no estate of a private character left in the dedicatory, if the fee does remain in him, which he can utilize, and if it vests in the lot owner by virtue of his deed to the lot, it confers no rights which are not secured to him by the implied covenant, arising out of the conveyance, that he shall have a right of way over the street, and egress and ingress to and from his premises by means thereof. The lot owner's rights in the street are just as sacred, so far as I can see, in the one case as in the other." In a recent Mississippi case it is said: "A distinction is made by some of the authorities in cases where the fee in the soil of the street is in the public—the State, county, or city—and where it remains in the abutting owner; and in the first case, the right of the abutting owner to compensation is denied, and in the latter, it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other

of the text writers also incline in the same direction.<sup>63</sup> The cases which have contributed more than any others to break down the distinction made in the earlier cases, as to the ownership of the fee of streets, are the New York Elevated railroad decisions.<sup>64</sup> The authority of these cases is somewhat shaken by the fact that the same court has, since the earlier decisions, reaffirmed the old distinction in the case of surface railroads.<sup>65</sup> The inconsistency of the two positions seems manifest, and, doubtless, if the court had not been embarrassed by prior decisions, the result in *Fobes v. Rome, etc., R. R. Co.* would have been different. Courts of other States will be more likely to follow the logic and good sense of the elevated railroad cases and reject the fine distinctions attempted in the case of surface railroads.<sup>66</sup>

In transactions between man and man concerning property, we are not aware of any instance in which the ownership of the fee of the street has cut any figure in fixing the price of the property or influencing the parties. The width of the street, the manner in which it is improved, the condition of the pavement, the questions of sewers, water, gas, etc., are factors of more or less importance. But whether the title extended to the center of the street or stopped at the street line, we never knew to be the subject of inquiry.

owner, or whether he has both the fee and the easement, he is equally entitled to require that nothing shall be done in derogation of his rights." *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279, 6 So. Rep. 230.

<sup>63</sup> *Cooley Const. Lim.*, p. 682, note 3 (6th Ed.); 2 Dill. Munic. Corp. §§ 704, 704a; *Keasby on Electric Wires*, pp. 61-68.

<sup>64</sup> *Story v. New York El. R. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164.

<sup>65</sup> *Fobes v. Rome etc. R. R. Co.*, 121 N. Y. 505, 24 N. E. Rep.

919, 3 Am. R. R. & Corp. Rep. 182.

<sup>66</sup> Thus in *Lamm v. Chicago etc. R. R. Co.*, 45 Minn. 71; 47 N. W. Rep. 455, it is said: "If the abutting owner, independently of the ownership of the fee of the street, has an easement in the street in front of his lot to the full width of it for the purpose of access, light and air, which is property, and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away or its enjoyment interfered with by a railroad constructed and

"The right of adjacency—the advantage of having your land upon the highway with right of access and light and air, this is what the people understand and value. Who owns the fee they do not know nor care."<sup>67</sup> So in case of any use of the street prejudicial to the abutting property, as by a railroad, the amount of damage actually done to the property would not vary one iota, whether the abutter owned the fee or not. The damage to the technical fee is nothing. The whole appreciable injury is sustained by the property beyond the street line, and arises from the interference with the easements of light, air and access and the annoyances occasioned by the particular use of the street, whatever it may be.

So the uses which the public may make of a street do not depend upon the ownership of the fee.<sup>68</sup> If the fee is in the abutting owner, it is subject to all legitimate street uses. If it is in the public, it is in trust for street uses, and is subject to certain rights or easements in the abutting owner which cannot be impaired by any diversion of the street to

operated on the surface of the ground, or at an elevation above it."

<sup>67</sup> Keasby on Electric Wires, pp. 66, 67.

<sup>68</sup> "Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well

as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes; and in the case of land acquired for the purposes of a street there is something in the nature of a contract, under which two co-existent and inviolable rights are created—one belonging to the public to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street it must be presumed that he does so in consideration of the contemplated benefits accruing to

other uses.<sup>69</sup> Whether, therefore, the public has an easement only or the fee, it has nothing more than a perpetual right to use the land for street or highway purposes. The street cannot be devoted to other uses without violating the rights of the abutting owners. What are legitimate street uses, is a question which in no way depends upon the fee. It necessarily follows from what has already been said, that the abutting owners' right to compensation, in case of any particular use of the street, depends upon whether the use is within the purposes for which highways and streets exist and are established. If it is, then the abutting owners' rights are subject to that use and he has no legal cause for complaint. If not, then the use is a perversion of the street, a violation of the trust and authority vested in the public, and an unlawful interference with the property rights of the abutting owner, for which he may have the appropriate remedies.

Undoubtedly the ownership of the fee would make a difference in the remedies open to the abutter in case of an improper use of the street.<sup>70</sup> But the right to compensation and the measure of damages should, in equity and good conscience, be the same whether the fee is in the abutter or in the public, and this result may be worked out, not only without violence to legal principles, but in harmony with them. When part of a tract or property is taken, just compensation is the difference in value before and after the taking, excluding general benefits.<sup>71</sup> Where the abutter owns the fee of a street and it is used for some purpose which is not a legitimate street use, he is entitled to com-

his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that in estimating the amount to be paid the value of the benefits above mentioned were likewise considered." *White v. Northwestern*

*N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103. To same effect *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69.

<sup>69</sup> See the preceding sections, §§ 91d-91j.

<sup>70</sup> See chap xxviii.

<sup>71</sup> Post, § 471.



pensation, the same as in any case of partial taking.<sup>72</sup> Where the fee is in the public, the abutter has easements of light, air and access which are property. To take or impair these is to take a part of the property in the abutting lot, as much so as to take the right of exclusion. Logically, there is a partial taking of the lot, as much as if one corner of it was cut off, and the same rule of compensation may be applied, as in the former case.<sup>73</sup>

It seems every way desirable that a distinction, which is never made in the every-day dealings between man and man, touching abutting property, should be abandoned by the courts. There is no substantial distinction between a perpetual easement for street uses and a fee for street uses. There is a manifest injustice in awarding compensation to one man for a railroad in a street or other similar use, and denying it to another, solely on a distinction which is so purely technical and unsubstantial. And so of any distinction in the elements or measure of damages.

## II—STREET GRADE CASES.

§ 92. **Early English cases.**—The earliest case upon this subject is that of *Leader v. Moxon*,<sup>74</sup> decided in 1773, in the English Court of Common Pleas. Certain commissioners were authorized by act of parliament "to pave, repair, sink or alter certain streets in such manner as they should think fit." Defendants, acting under these commissioners, raised the grade of a street some six feet in front of plaintiff's house, intercepting the light and preventing access thereto. The plaintiff brought suit for the damages so occasioned to his premises, and the action was sustained. The case is badly reported and the ground of the decision is hard to make out. But Gould J. is reported as saying: "Every man of common sense must understand that this act of Parliament ought to be carried into execution without doing such enormous injury to individuals as hath been manifestly done to the plaintiff in this case. Whenever a trust is put in commissioners by act of parliament, if they misdeemean them-

<sup>72</sup> Post, § 493.

<sup>73</sup> See post, § 503e.

<sup>74</sup> 3 Wils. 461; 2 Bl. 924.

selves in that trust, they are answerable criminally in the King's Bench; if they aggrieve and damnify the subject, as they have done in the present case, they are answerable in this court, civiliter in damages to the party injured.<sup>75</sup> Blackstone J. says: "I am of the same opinion. \* \* \* I think the commissioners have acted arbitrarily and tyrannically, and that the damages are too small." This case, instead of becoming an authority, was speedily overruled and explained away. Twenty years later Lord Kenyon laid down the law in the case of *The Governor and Company of the British Cast Plate Manufacturers v. Meredith*,<sup>76</sup> which has ever since been a leading case, both in England and America. Certain commissioners, acting under and in accordance with an act of parliament, raised the street in front of the land of the plaintiff who brought suit for damages. Lord Kenyon says: "If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction. \* \* \* Some individuals suffer an inconvenience under all these acts of parliament; but the interests of the individual must give way to the accommodation of the public." His Lordship questioned the correctness of the report of *Leader v. Moxon*, and explained it on the ground that the commissioners in that case had abused their authority and acted in an arbitrary and abusive manner.<sup>77</sup> The principle of this decision is that

75 3 Wils. 467.

76 4 T. R. 794, 1792.

77 *Leader v. Moxon* has been similarly explained in other cases. In *Sutton v. Clark*, 6 Taunton, 28, 1815, the court, referring to it, say: "The court thought that they (the commissioners in that case) were acting in a most tyrannical and oppres-

sive manner, and that, though they had a right to pave, and perhaps to raise, the street, they had acted so arbitrarily, that they were answerable." Also in *Boulton v. Crowther*, 2 B. & C. 703, 708, 1824; S. C. 9 E. C. L. R. 306, Bailey J. said: "In *Leader v. Moxon* the decision proceeded upon the ground that

no action will lie for the doing of that which is authorized by an act of parliament; and the reason is that an act of parliament is, in England, the supreme law of the land. The same principle has been reiterated in numerous cases.<sup>78</sup>

§ 93. **Value of English precedent in constitutional questions.**—The English cases to which we have referred have been much cited in America to show that the owner of property damaged by works of a public nature, such as a change of grade, cannot recover compensation for such damage. But it is evident that they have no proper application in such cases. In England, as we have said, an act of parliament is the supreme law of the land. Courts cannot declare that wrong which an act of parliament has made lawful. In all cases of damage from the execution of public works, the English courts have simply to inquire whether the works were authorized by law and whether they have been executed with care and skill. If so, there can be no recovery unless a remedy is provided by the act. But in the United States an act of the legislature may be no justification whatever. The legislature is powerless to do that which the constitution prohibits. And, in case of damages caused by public works, it is necessary in this country to inquire, not only whether the works are authorized by law and have been carefully executed, but also whether the damage amounts to a taking of property within the meaning of the constitution. In solving this last question the English cases afford us no aid, or practically none. This distinction is frequently lost sight of, and we wish to insist upon it here, once for all.<sup>79</sup>

the commissioners had exceeded their authority in raising the pavement so as to obstruct the plaintiff's windows." So Little-dale to the same effect.

<sup>78</sup> Sutton v. Clark, 6 Taunton, 28; 1 E. C. L. R. 493; Jones v. Bird, 5 B. & Ald. 837; 7 E. C. L. R. 455; Hall v. Smith, 2 Bing. 156; 9 E. C. L. R. 524; Boulton v. Crowther, 2 B. & C. 703; 9 E.

C. L. R. 306; The King v. The Bristol Dock Co., 6 B. & C. 181. In Boulton v. Crowther, the act provided for compensation for property taken, and it was insisted that to diminish its value by cutting off access, etc., was a taking within the act, but it was held otherwise.

<sup>79</sup> This distinction is pointed out by the Supreme Court of

§ 94. **Leading cases in the United States.** **Callendar v. Marsh.**—The leading case in this country is that of *Callendar v. Marsh*, 1 Pick. 417, 430, decided in 1823. The defendant, acting as highway surveyor for the city of Boston, cut down the street in front of plaintiff's house so as to lay bare its walls and endanger its falling, to remedy which he was obliged to incur large expense. The court having determined that the work was authorized by legislative enactment, proceeded to consider whether the plaintiff's property was taken within the meaning of the constitution, and whether he could recover upon any ground. This question they solved in the negative. The court held this provision applied only to property actually taken and appropriated by the government, and not to consequential damages; that when the highway was established, whether by condemnation or otherwise, the public acquired not only the right to pass over the surface in the state it was in when first made a street, but also the right to repair and amend the street in such manner as the public needs might from time to time require; that the liability to damages by such alterations was a proper subject for the inquiry of those who laid out the road, or, if the title was acquired by purchase, the proprietor might claim compensation not only for the land taken, but for such damages, and that persons purchasing upon a street after the lay-out, were supposed to indemnify themselves against loss by reason of further improvements or to take the chance of such improvements. The court also say that the same principle applied as in case of adjoin-

Ohio in *Crawford v. Village of Delaware*, 7 Ohio St. 459, 466, 1857, from which we quote as follows: "The power of the English parliament is supreme. It would be quite as absurd for English courts to pronounce an act of parliament, adopted by the three Estates of the Realm, unconstitutional, or unauthorized, as for this court to pronounce a provision of the Constitution of

the United States unconstitutional and void. 'What the parliament doeth, no authority on earth can undo.' An authority, therefore, derived from the Supreme power of the State, or, in other words, operations undertaken and conducted by virtue of an act of parliament, cannot be deemed unauthorized in view of the English law, or lay any foundation for a common

ing proprietors.<sup>80</sup> This case has had an important influence in moulding the law of this country.

law action for damages. If, indeed, the supreme power of a State authorizes and directs an act to be done, who has the power to pronounce that act unlawful? No co-ordinate power exists to control it. The grantee of a franchise or a public agent, so long as he does not transcend the authority conferred upon him by act of parliament, in the exercise even of eminent domain or its incidents, represents the supreme power of the State; and just so far as the same supreme power has provided the mode and means of compensation for the violation of the rights of private property, in the exercise of eminent domain or its incidents, there is a remedy; but no further. It is true, that it is the duty of parliament, and one which is in general scrupulously performed, to provide compensation to individuals who are deprived of their property, for the public use, or who are injuriously affected by the erection of public works. But there is no power over parliament to enforce this duty, or to create a liability, beyond what parliament specifically recognizes and provides. Hence the English courts, in holding that an action against commissioners of streets or municipal officers or their agents, acting under the authority of an act of parliament, will not lie for damages occasioned by the construction of a public work, any further than is specially provided for by the law

itself, do not simply decide a principle of municipal law, but announce a constitutional principle, inseparable from a recognition of the fiat of the supreme power of State."

<sup>80</sup> On this point the court say: "The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time. or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of the city may require, in order to render the passage to and from the several parts of it safe and convenient, and, as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to

§ 95. **Other early cases.**—A few years after the decision in *Callendar v. Marsh*, the same question arose in Tennessee and Kentucky, and was decided in the same way, though without reference to the case from Massachusetts. In both the former States, the law applicable to adjoining proprietors was made the basis of the rule laid down.<sup>81</sup> The question was disposed of in a summary way in an early case in Pennsylvania by a reference to the English cases, and a sweeping assertion that the defendant corporation had the power and could not be made responsible for mere consequential injury.<sup>82</sup>

The question was elaborately considered by the New York Court of Appeals in *Radcliff's Executors v. Mayor, etc., of Brooklyn*, 4 N. Y. 195, 203, 1850. The street was cut down in front of plaintiff's premises so that his soil, shrubbery, fences, etc., fell into the street, and he was put to great expense in restoring his premises and adapting them to the new grade. The case was said "to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land owner." "In leveling and grading the street," says the court, "they (the defendants) were at work on their own land, doing a lawful act for a lawful purpose." The conclusion follows that they could not be liable, for no person is responsible for the consequences of a lawful act

surveyors the power to make these improvements, every one who purchases a lot upon the summit or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss." And again, "We can perceive no difference in the principle on which this action is founded, and that which was involved in the case of *Thurston v. Hancock*, 12 Mass. 220." The latter is a leading case as to the

rights of adjoining proprietors, in which the rule is laid down that if a man does what he has a right to do on his own land, without trespassing upon any law, custom, title or possession, he is not liable for injurious consequences which may result, unless he acts maliciously.

<sup>81</sup> *Keasy v. City of Louisville*, 4 Dana, Ky. 154, 1836; *Humes v. Mayor etc. of Knoxville*, 1 Humph. 403, 1839.

<sup>82</sup> *Green v. Borough of Reading*, 9 Watts, 382.

done upon his own property. It was also held upon authority and upon principle that the damages complained of were not a taking within the constitution, and consequently that the laws authorizing the acts which produced the injuries were valid and a complete justification. "If the statute under which the defendants acted is constitutional, it is settled that they are not answerable to third persons, whatever damage they may have suffered. Indeed, it is absurd to say, that public officers may be liable to an action for what they have done under lawful authority, and in a proper manner."<sup>83</sup>

This case, with that of *Callendar v. Marsh*, ante, may be considered as having settled the law of this country as respects claims for damages caused by elevating or depressing the grade of streets. Many cases in other States have been disposed of by a simple reference to these two authorities.

§ 96. **The general doctrine.**—In conformity with the foregoing cases, it has been held in nearly every State in the Union, that there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law.<sup>84</sup>

<sup>83</sup> The same court, in *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N. Y. 10. in reference to *Radcliff's* case, say: "The case carries to the utmost limit the right of the legislature, for public reasons, to interfere with private property to the injury of the owner without making compensation."

<sup>84</sup> *Simmons v. City of Camden*, 26 Ark. 276, 1870; *Burritt v. New Haven*, 42 Conn. 174; *Dorman v. City of Jacksonville*, 13 Fla. 538, 1870; *Markham v. Atlanta*, 23 Ga. 402, 1857; *Mayor etc. of Macon v. Hill*, 58 Ga. 595, 1877; *Fuller v. Atlanta*, 66 Ga.

80, 1880; *Roberts v. Chicago*, 26 Ills. 249, 1861; *Murphy v. Chicago*, 29 Ills. 279, 1862; *City of Quincy v. Jones*, 76 Ills. 231, 1875; *Snyder v. Rockport*, 6 Ind. 237, 1855; *La Fayette v. Spencer*, 14 Ind. 399, 1860; *Macy v. Indianapolis*, 17 Ind. 267, 1861; *La Fayette v. Spencer*, 19 Ind. 326, 1862; *Columbus v. Storey*, 33 Ind. 195, 1870; *Terre Haute v. Turner*, 36 Ind. 522, 1871; *Kokomo v. Mahan*, 100 Ind. 242; *North Vernon v. Voegler*, 103 Ind. 314; *Rensselaer v. Leopold*, 106 Ind. 29; *Creal v. Keokuk*, 4 G. Greene (Ia.), 47, 1853; *Freeland v. City of Muscatine*, 9 Ia. 461, 1859;

§ 97. *Ratio decidendi of these cases.*—An examination of the cases cited in the last section shows that, so far as the courts have attempted to reason out their decisions, their conclusions have been made to rest upon one or more of the following grounds:

First. That, when a street or highway is laid out, compensation is given once for all, not only for the land taken,

Cole v. Same, 14 Ia. 293, 1862; Ellis v. Iowa City, 29 Ia. 229, 1870; Russell v. City of Burlington, 30 Ia. 262, 1870; City of Burlington v. Gilbert, 31 Ia. 356, 1871; Methodist Episcopal Church v. Wyandotte, 31 Kan. 721; Keasy v. City of Louisville, 4 Dana (Ky.) 154, 1836; Newport & Cincinnati Bridge Co. v. Foote, 9 Bush (Ky.) 264, 1872; Reynolds v. Shreveport, 13 La. An. 426, 1858; Briggs v. Lewiston & Auburn Horse R. R. Co., 79 Me. 363; Callendar v. Marsh, 1 Pick. 418, 1823; Reddick v. Baltimore etc. H. R. R. Co., 34 Md. 463, 1871; City of Pontiac v. Carter, 32 Mich. 164, 1875; Lee v. City of Minneapolis, 22 Minn. 13, 1875; Henderson v. Minneapolis, 32 Minn. 319; Genois v. St. Paul, 35 Minn. 330; St. Louis v. Gurno, 12 Mo. 414, 1849; Taylor v. St. Louis, 14 Mo. 20, 1851; Hoffman v. St. Louis, 15 Mo. 651, 1852; Shattner v. City of Kansas, 53 Mo. 162, 1873; Nebraska City v. Lampkin, 6 Neb. 27, 1877; Burden v. Nashua, 17 N. H. 477, 1845; Plum v. Morris Canal Co., 10 N. J. Eq. 256, 1854; Fish v. Mayor etc. of Rochester, 6 Paige, 268, 1837; Graves v. Otis, 2 Hill 466, 1842; Waddell v. Mayor etc. of New York, 8 Barb. 95, 1850; Radcliff's Executors v. Mayor etc. of Brooklyn, 4 N. Y. 195, 1850;

Conklin v. New York, Ontario & Western Ry. Co., 102 N. Y. 107; Green v. Borough of Reading, 9 Watts, 382, 1840; Henry v. Pittsburgh & Allegheny Bridge Co., 8 W. & S. 85, 1844; O'Connor v. Pittsburgh, 18 Pa. St. 187, 1851; In re Ridge Street, 29 Pa. St. 391, 1857; City of Reading v. Keppelman, 61 Pa. St. 233, 1869; Rounds v. Mumford, 2 R. I. 154, 1852; Humes v. Mayor etc. of Knoxville, 1 Humph. (Tenn.) 403, 1839; Penniman v. St. Johnsbury, 54 Vt. 306, 1881; Smith v. City Council of Alexandria, 33 Gratt. 208, 1880; Kehr v. Richmond City, 81 Va. 745; Goszler v. Georgetown, 6 Wheat. 593, 1821; Smith v. Corporation of Washington, 20 How. 135, 1857; Transportation Co. v. Chicago, 99 U. S. 635; Durand v. Ansonia, 57 Conn. 70, 17 Atl. Rep. 283; Selden v. City of Jacksonville, 28 Fla. 558, 10 So. Rep. 457; Baker v. Town of Shoals, 6 Ind. App. 319, 33 N. E. Rep. 664; Interstate Consol. R. Co. v. Early, 46 Kans. 197, 26 Pac. Rep. 422; Atchison etc. R. Co. v. Arnold, 52 Kans. 729, 35 Pac. Rep. 780; Schneider v. City of Detroit, 72 Mich. 240, 40 N. W. Rep. 329; Rakowsky v. City of Duluth, 44 Minn. 188, 46 N. W. Rep. 338; Robinson v. Great Northern R. R. Co., 48



but for damages which may at any time be occasioned by adapting the surface of the street to the public needs.<sup>85</sup>

Second. That the public, as proprietors of the street, stand in the same relation to the abutting lot owners as an individual would who owned the strip of land constituting the street, and that their rights, duties and liabilities are

Minn. 445, 51 N. W. Rep. 384; Yanish v. City of St. Paul, 50 Minn. 518, 52 N. W. Rep. 925; Healey v. New Haven, 47 N. H. 305; McCarthy v. Far Rockaway, 3 App. Div. 379, 38 N. Y. Supp. 989; Smith v. White Plains, 67 Hun 81, 22 N. Y. Supp. 453; Wolfe v. Pierson, 114 N. C. 627, 19 S. E. Rep. 264; Gerhard v. Seekonk Riv. Bridge, 15 R. I. 334, 5 Atl. Rep. 199; Sullivan v. Webster, 16 R. I. 33, 11 Atl. Rep. 771; Home Bldg. Co. v. City of Roanoke, 91 Va. 52, 20 S. E. Rep. 295; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. Rep. 313, 7 Am. R. R. & Corp. Rep. 64; Smith v. Eau Claire, 78 Wis. 487, 47 N. W. Rep. 830; Regina v. Perth, 14 N. E. Q. B. 156; Walsh v. Milwaukee, 95 Wis. 16; Hosmer v. Gloversville, 27 N. Y. Misc. 669; Garraux v. Greenville, 53 S. C. 575, 31 S. E. Rep. 597.

<sup>85</sup> Callendar v. Marsh, 1 Pick. 413; Skinner v. Hartford Bridge Co., 29 Conn. 523; Rounds v. Mumford, 2 R. I. 154; Fellows v. City of New Haven, 44 Conn. 240; City of Pontiac v. Carter, 32 Mich. 164, 172. In the latter case the court, per Cooley, J., say: "The injury in all these cases is incidental to an exercise of public authority, which in itself must be assumed to be proper, because it is had by a public body acting within its jurisdic-

tion, and not charged with malice or want of good faith. It must, therefore, be regarded as an injury that every citizen must contemplate as one that, with more or less likelihood, might happen. When the land was taken for a street, if damages were assessed, they would cover this possible injury, and it could never be known subsequently that the jury, in estimating them, did not calculate upon a change in the grade of the proposed street as probable, and attach considerable importance to it in their estimate. It is matter of common observation, that much beyond the value of land taken is sometimes given in these cases; not because of any present injury, but because contingencies cannot be fully foreseen. And the rule in such cases is, that all possible damages are covered by the award, except such as may result from an improper or negligent construction of the public work, or from an excess of authority in constructing it. In other words, the award covers all damages resulting from the doing in a proper manner whatever the public authorities have the right to do; but it does not cover injuries from negligence or from trespasses. And one who gives his land for the purpose of a public

determined by the same rules as apply to adjoining proprietors of land.<sup>86</sup>

Third. That this species of damages is not a taking within the meaning of the constitution, and, consequently, if the works occasioning the damage are authorized by law, no action will lie.<sup>87</sup> We shall advert to these principles further on.<sup>88</sup>

§ 98. **The Ohio cases.**—The decisions in Ohio are exceptional. The first cases went up on a demurrer to the declaration. In *Goodloe v. Cincinnati*,<sup>89</sup> the suit was for damages caused to plaintiff's property by cutting down a street, and the declaration alleged that it was done illegally and maliciously. In *Smith v. Cincinnati*,<sup>90</sup> the facts were the same, except that the acts were only charged to have been done illegally. In both cases a demurrer to the declaration was overruled, and in both cases there were afterwards trials and judgments for the plaintiff in the court below upon the general issue. These demurrers would not have been decided differently, probably, in any other State.<sup>91</sup> In *Scovil v. Geddings*,<sup>92</sup> the defendants, by authority of the trustees of Cleveland, lowered the street in front of plaintiff's property, and the suit was for damages thereby occasioned. The court held that such damages were not a taking within the constitution, and that the action would not lie. The lead-

way is supposed to contemplate all the same contingencies, and to make the gift on the supposition that the incidental benefits will equal or exceed all possible incidental injuries."

<sup>86</sup> *Callendar v. Marsh*, 1 Pick. 418; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; *Quincy v. Jones*, 76 Ills. 231; *Waddell v. Mayor etc. of New York*, 8 Barb. 95; *Humes v. Mayor etc. of Knoxville*, 1 Humph. 403; *Simmons v. City of Camden*, 26 Ark. 276; *Smith v. Corporation of Washington*, 20 How. 135. The

analogy is expressly denied in some cases: *Fellows v. New Haven*, 44 Conn. 240, 253; *Goodall v. Milwaukee*, 5 Wis. 32.

<sup>87</sup> *Callendar v. Marsh*, 1 Pick. 418; *Macy v. Indianapolis*, 17 Ind. 267; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Wilson v. New York*, 1 Denio, 595; *Reynolds v. Shreveport*, 13 La. An. 426; *City of Pontiac v. Carter*, 32 Mich. 164.

<sup>88</sup> Post, §§ 100, 114, 122.

<sup>89</sup> 4 Ohio, 500, 1831.

<sup>90</sup> 4 Ohio, 515, 1831.

<sup>91</sup> Post, § 105.

<sup>92</sup> 7 Ohio, Pt. 2, 211, 1836.

ing case of *Callendar v. Marsh* was cited with approval. This case is explained or reconciled in the later decisions by distinguishing between the corporate authorities and their agents, holding that the latter would not in any event be personally liable for doing that, as agents of the corporation, which the corporation had power to do.<sup>93</sup> This, however, would be contrary to the general rule that in actions *ex delicto* agents and principals are alike responsible.

The question of the liability of the corporation was presented to the court in a case which went up shortly after from the same city,<sup>94</sup> and it was again held that such damages did not constitute a taking or give any right of action, and *Callendar v. Marsh* and *Scovil v. Geddings* are cited with approbation. In both these cases in the 7th and 8th Ohio it appears that a statute gave a remedy in such cases, but the decisions, unless possibly the latter, are not put upon the ground that the statutory remedy was exclusive. It remained for the court to discover, in a later case, that this was the ground of decision in those cases.<sup>95</sup>

In *Rhodes v. Cleveland*,<sup>96</sup> it appeared that the city cut ditches and watercourses along the streets in such a manner as to cause water to flow upon and wash away the plaintiff's land. The defendant was held liable, but not upon any very tangible grounds. The decision was not based upon constitutional right, but rather upon natural equity and the maxim *sic utere tuo ut alienum non laedas*.<sup>97</sup>

<sup>93</sup> See *Crawford v. Village of Delaware*, 7 Ohio St. 459.

<sup>94</sup> *Hickox v. Cleveland*, 8 Ohio, 543, 1838.

<sup>95</sup> 10 Ohio, 159, 1840.

<sup>96</sup> 10 Ohio, 159, 1840.

<sup>97</sup> The court say: "Upon the whole, then, we believe that justice and good morals require that a corporation should repair a consequential injury, which ensues from the exercise of its functions, and that if we go further than adjudicated cases have yet gone, we do not transcend

the line, to which we are conducted by acknowledged principles. \* \* \* That the rights of one should be so used, as not to impair the rights of another, is a principle of morals, which from very remote ages has been recognized as a maxim of law. If an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy; if a corporation, acting within the scope of its authority, should work wrong to another, the same principle of

This case is the starting point of the peculiar doctrine of the Ohio court, but it is to be observed that it was not for damages caused by a change of grade, but by a physical invasion of the property, and belongs to a class in which a recovery has been allowed in many other States.<sup>98</sup> The next case is that of *McComb v. Town of Akron*,<sup>99</sup> which was twice in the Supreme Court. *McComb* had erected a store upon his lot and adjusted it to the grade of Howard street, upon which his lot abutted. There was at this time, however, no established grade. Afterwards the town lowered the grade, in consequence of which the value of the plaintiff's property was greatly depreciated, though it was not otherwise damaged. The corporation was held liable "to the extent of the real and substantial injury done to the plaintiff's property by its act of leveling the street." The decision appears to rest upon the broad ground of natural right and justice. Thus the court say: "If a municipal corporation, for the good of all within its limits, see proper to cut down a street, it is nothing more than right that an injury there done to a single individual should be shared by all."<sup>1</sup> In all these cases the question whether a corporation can be made liable in an action of tort is much discussed, with an implication that if that question is answered in the affirmative its liability in this class of cases would necessarily follow.<sup>2</sup>

ethics demands of them to repair it, and no reason occurs to the court, why the same remedy should not be applied, to compel justice from them." The fault with this reasoning is, first, that courts do not administer law upon ethical principles, and, second, that individuals cannot commit injuries in the proper exercise of their lawful powers. An injury is the violation of a legal right, and lawful power in one to violate the legal right of another is an absurdity, a contradiction in terms. Of course a

person may exercise lawful powers with negligence and so render himself liable, but then the liability is based upon the negligence and not on the exercise of the powers.

<sup>98</sup> Post, § 103.

<sup>99</sup> 15 Ohio, 474, 1846; *Town of Akron v. McComb*, 18 Ohio, 229, 1849.

<sup>1</sup> 15 Ohio, p. 480.

<sup>2</sup> *Bronson, C. J.*, of the New York Court of Appeals, referring to *McComb v. Akron*, 15 Ohio, 474, says: "If the case goes on the ground that the corporation,

The unsatisfactory nature of these decisions seems to have impressed itself upon the Ohio court, and, when the question next comes up for decision, we find them making a careful review of all the prior cases; and, although their results are approved and adhered to, the loose grounds upon which they rest are tacitly abandoned and their doctrine established upon a new basis. The case referred to is that of *Crawford v. Village of Delaware*.<sup>3</sup> In that case, the plaintiff had built a house upon his lot, with reference to the grade of the adjacent street as it then existed. Afterwards the defendant established a grade for the street some six feet below the natural surface, and made the necessary excavation opposite the plaintiff's premises. The court instructed the jury, among other things, "that when such corporation neglects to fix any grade, and none is established for a street, and the owner of a lot builds upon and improves his lot in reference to the then existing state of the road or street used in front of his lot, and uses ordinary discretion and judgment in making his improvements, having reference to the probable future improvements of the town, and with reference also to the right possessed by the corporate authorities to make a reasonable and proper grade of such street, and he is afterwards injured by the making of such grade, he is entitled to recover for actual damages he may sustain, even though the grade so afterward made may be a reasonable and proper one. But if he so locates his house without such reasonable reference to

though it had ample authority to grade the street, did it in an illegal and improper manner, and thereby caused an injury to the plaintiff's property, the decision is well enough. But if the doctrine of the case be, that the corporation was answerable, because it was a corporation, and when a natural person, acting under the like authority, would not have been liable, the decision is entitled to no respect whatever. If the court intended

to hold, that persons, whether artificial or natural, were answerable for the damages which might result to an adjoining land-owner from the grading of the street, though the act was done under ample authority, and in a proper manner, the case is in conflict with many decisions, and cannot be law beyond the State of Ohio." *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195, 205, 1850.

<sup>3</sup> 7 Ohio St. 459, 1857.

future reasonable and proper improvements of the streets adjoining his lot, and without such exercise of discretion and judgment, and the town afterwards makes such reasonable and proper grade, and he is thereby injured, he cannot recover for such injury. That in ascertaining whether such act of the defendant in making the improvement, was a just and reasonable exercise of its authority to improve the street, the jury are authorized to take into consideration any evidence showing that it was the first improvement and the first grading of the street, also showing the inequality of the ground, and that the plaintiff's property was so situated in relation to it, as that the grade and improvements should have been reasonably anticipated by the plaintiff; and where such grade and improvements could have been thus anticipated by the exercise of ordinary discretion and judgment, the plaintiff is not entitled to damages for the making of such reasonable and proper grade and improvement." There was conflicting evidence upon the points submitted by the instructions; the jury appear to have found for the defendant, and judgment on the verdict was affirmed.<sup>4</sup> The right to recover at all in such cases is based upon the ground that an abutting owner's right to the use of a street is itself property which cannot be taken without compensation.<sup>5</sup> The court then go on to lay down the following propositions:

First. That the owner of an unimproved lot cannot re-

<sup>4</sup> We say "appear to have found for the defendant," because it is a matter of inference only. The plaintiff took the case up. It may be the jury found a small verdict in his favor which he sought to have set aside.

<sup>5</sup> Thus the court: "Distinct from the right of the public to use a street, is the right and interest of the owners of lots adjacent. The latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim: a

private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appurtenant to the lots, unlike any right of one lot-owner in the lot of another, is as much property as the lot itself." p. 469.

cover for filling, ditching or cutting down a street, for he is presumed to purchase the lot with a view to the future improvement of the street in such reasonable manner as the public authorities may deem expedient.

Second. That the owner of a lot upon a street, the grade of which has not been established, must use reasonable care and judgment in making his improvements, with reference to the right possessed by the corporation to make a reasonable and proper grade.

Third. That when the owner of a lot makes improvements with reasonable care and judgment, in view of the right of the corporation to make a reasonable and proper grade, or makes improvements with reference to a grade already established, and a change is afterwards made in the street which interferes with the access to his improvements from the street, he is entitled to recover damages.

"It is," says the court, "as positive and substantial an injury to private property, and as direct an invasion of private right, incident to a lot, as if the erections upon the lot were taken for public use. It comes not within the letter, but manifestly within the spirit, of the constitution, which requires compensation for property taken for public use."

In *Jackson v. Jackson*,<sup>6</sup> the ground of recovery in such cases is still more explicitly stated. A township road ran through the plaintiff's farm, connecting with a county road. This was altered up to, but not upon, his farm. This suit was brought to recover damages alleged to have been occasioned to his farm by such alteration. A recovery was denied, on the ground that the damages were too remote. In commenting upon prior cases, it was held that compensation had been given in highway cases, in obedience to the constitution, as for private property taken for public use, and that the cases only went to the extent of holding that the adjacent owner, "has a private right of access to and from the street or highway; and, when he has made improvements on his land, with direct reference to the adjoining highway as then established, and with reasonable refer-

<sup>6</sup> 16 Ohio St. 163, 168, 1865.

ence to its prospective improvement and enjoyment by the public, he has a private right of way, or passage, to and from the highway as it then exists; and any substantial change in the highway, to the injury of such passage or way, is an invasion of his private property; and this private right extends so far as the reasonable and convenient enjoyment of such improvements requires the use of the adjacent highway; but, beyond such necessary use thereof, the private right is merged in that of the public;" that, as the plaintiff had not been deprived of any such private right in this case, no property of his had been taken, and he could not recover.

In *Cincinnati v. Penny*<sup>7</sup> all the cases were again reviewed and the same doctrines affirmed. Penny sued for damages to a building occasioned by excavating for a sewer. His recovery was defeated on the ground that he did not exercise reasonable prudence in the erection of his building, in view of the right of the city to appropriate the alley to such uses in the future. "We have no disposition," says the court, "to depart from the line of decisions formerly made by this court upon this subject. \* \* \* We believe the principles established by our former cases to be most just and equitable."

In *Youngstown v. Moore*<sup>8</sup> the same principles were fully approved, and a judgment for damages caused by lowering the grade of a street was affirmed.

Finally comes the case of *Akron v. The Chamberlain Company*,<sup>9</sup> decided in 1878. In 1842 the Chamberlain Company built a flouring mill upon the lot in question. At that time no grade had been established for the street in front. In 1876 the grade of the street was raised fourteen feet in front of the mill, and the company brought this suit for the damages thereby occasioned, and recovered a verdict and judgment for \$9,600.

The court "adhere, with entire satisfaction, to the doctrines enunciated, in *Cincinnati v. Penny*," but explain that

<sup>7</sup> 21 Ohio St. 499, 504, 1871.

<sup>8</sup> 34 Ohio St. 328, 1878.

<sup>9</sup> 30 Ohio St. 133, 1876.



it never had been decided, and that the court had never intended to decide, that if an owner used reasonable care and judgment in making improvements and was afterwards injured by the establishment of a grade, he could recover though the grade was a reasonable and proper one. "We are now unanimously of opinion," says the court, "that if the subsequent grade, in such case, be reasonable, or, in other words, if it be established in the reasonable exercise of the authority conferred on the municipality, at the time it is made, then such grade should have been anticipated by the owner of the adjacent lot, and his improvements should have been made with reference thereto."

The right of recovery is limited to three cases: (1) where one builds to an established grade and it is changed to his damage; (2) where one builds before a grade is established, but succeeds in anticipating the grade which is afterwards established, and the grade after being so established is changed; (3) where one builds before a grade is established and afterwards an unreasonable grade is established. The court hold that a grade may be established in the sense here intended, not only by an ordinance or resolution for that purpose, but also by any improvement of the street indicating permanency.<sup>10</sup>

<sup>10</sup> The court say: "While we recognize the general rule to be, that no liability on the part of a municipality for injury to abutting property, by reason of improvement of a street, exists where such improvement is properly made, yet this rule is subject, as we have seen, to the exception that where abutting property is improved with reference to an existing street, so graded or improved under the authority of the public agents having the control thereof, as to indicate, fairly and reasonably, permanency in the character of the street improvement, a liability is cast upon the city or

village for injury resulting from subsequent changes. And it would seem to follow, as a logical sequence, that if, before a permanent grade is thus established, the owner of an abutting lot improves the same with reference to a reasonable grade to be established in the future and his anticipations are realized in the subsequent establishment of the grade, he should thereafter, in respect to such improvement, be entitled to enjoy the same right in the grade of the street which was thus fairly and reasonably anticipated, as if he had improved his lot after the grade had been so established."

The right of recovery is in all cases limited to the property in front of which the change is made. Where the grade of a street on which the plaintiff abutted was raised on a part near but not in front of plaintiff, it was held he could not recover, although his property was damaged.<sup>11</sup>

Upon a review of all the Ohio cases, therefore, it appears that no recovery can be had in any case for damages to unimproved property by reason of a change of grade, that where property is improved and the improvements are adjusted to an established grade, whether built before or after its establishment, a recovery may be had for any damages occasioned by a change of grade, and finally that, if improved property is damaged by an unreasonable grade or by an unreasonable exercise of the power to grade, then there may be a recovery.<sup>12</sup>

In all the later cases the right of recovery is based upon the constitutional guaranty that private property shall not be taken for public use without just compensation. The private property which is taken in such cases is spoken of as the right of access.<sup>13</sup> But the right of access exists the same, whether the property is improved or unimproved, and whether a grade has been established or not. If to interfere with it in one case is a taking, then such interference should be a taking in every case. No good ground exists for a distinction. That there ought to be compensation in some cases and not in others is a consideration which addresses itself to the legislature and not to the courts. The uncertain, rambling and contradictory condi-

<sup>11</sup> *Eagle White Lead Company v. Cincinnati*, 1 Cinn. Supr. Ct. 154, 1871; *Smith v. Board of Comrs.*, 50 Ohio St. 628, 35 N. E. Rep. 796.

<sup>12</sup> Since the first edition was written there have been no decisions which change the rule of the prior cases, or which afford any new illustrations of its application. See *City of Cincinnati v. Whetstone*, 47 Ohio St. 196,

24 N. E. Rep. 409; *Smith v. Board of Comrs.*, 50 Ohio St. 628, 35 N. E. Rep. 796; *Neubert v. City of Toledo*, 9 Ohio C. C. 462; *Cheseldine v. Comrs.*, 6 Ohio C. C. 450; *Pitton v. City of Cincinnati*, 3 Ohio C. C. 593; *Nolte v. City of Cincinnati*, 3 Ohio C. C. 503.

<sup>13</sup> *Crawford v. Village of Delaware*, 7 Ohio St. at 469.

tion of the Ohio cases on this subject is itself evidence that they are not founded upon a logical basis.

§ 99. **The law in Kentucky.**—It appears from cases already cited<sup>14</sup> that the earlier decisions in Kentucky accord with the prevailing doctrine, but in a somewhat recent case the court of that State has taken an intermediate ground.<sup>15</sup> The plaintiff, a rolling-mill company in the city of Louisville, owned an entire block of ground upon which it had erected extensive works at a cost of some two hundred thousand dollars. The premises and adjacent streets were subject to an annual overflow from the Ohio River. The works were constructed in such manner that their only outlet was onto and over Brook street. The city passed an ordinance for raising the grade of Brook street so that, at the point of the company's gateway, which was their only means of ingress and egress, the street would be twelve feet above the company's lot. The ordinance also required the company either to fill up their lot or build a retaining wall for the protection of the street, and provided that, in default of the company doing so, the city might construct the same at the company's expense. It appeared that the result of this improvement would be to render the property of the company almost worthless, and besides, if the ordinance was carried out as to the retaining wall, it would compel the company to incur a large expense to accomplish the destruction of its own property. It was one of the "hard cases" so proverbial for "bad law." The court seem to have been appalled by the magnitude of the loss with which the company was threatened, and granted an injunction restraining the work until compensation should be made to the company. The decision, which is by a majority of the court, seems to be based upon the ground that the case was an extraordinary one, in which all the ordinary principles and presumptions failed; that, while lot-owners may be taxed specially for local improvements, yet such right rests upon the fact that special benefits are conferred and that when the foundation of the right fails, as in this case, the

<sup>14</sup> Ante § 95.

<sup>15</sup> *Louisville v. Rolling Mill Co.*, 3 Bush, 416, 1867.

right is gone, and that, while such lot-owners may be presumed to have purchased in contemplation of the right of the public to make such improvements as are ordinary and usual, yet, that this was of such an extraordinary and unusual character that the law would not presume that it was assented to by the plaintiff when it purchased the property. It does not seem to us that this decision, as put by the court, is either logical or sound. It is treated in the opinion as the case of raising the grade of a street for its improvement. In this view there is nothing extraordinary or unusual about the improvement. It is not unusual for a street to be raised or lowered ten feet. The only extraordinary and unusual feature presented by the case is the very large amount of damage accruing to the complainant. Had it not been for this feature of the case, that is, the extreme hardship of it, the bill would undoubtedly have been summarily dismissed. The only possible ground which we can see for justifying the decision is that it was proposed to raise the grade of the street, not for the purpose of improving the street for use as a highway, but to form a dike or levee against the river. But even this view would not warrant the injunction, but only an action for damages. There is no logical ground for a distinction between usual and slight changes and great and unusual changes in the grade of a street. There is no reason why compensation should be given for the large damage caused by raising the grade ten feet, and none for the small damage by raising the grade one foot. The damages are the same in kind in all cases where the grade of a street is changed, and logically there should be a right to recover in all cases or in none.<sup>16</sup> A recent case in Tennessee also holds that where access to abutting property is impaired or destroyed by a change of grade there is a taking.<sup>17</sup>

§ 100. **Rights of abutting owners.**—In the rearrange-

<sup>16</sup> See comments of Judge Dillon on this case in his work on *Municipal Corporations*, § 784, note. See also remarks of the court in *Selden v. City of Jack-*

*sonville*, 28 Fla. 553, 10 So. Rep. 457.

<sup>17</sup> *Hamilton County v. Rape*, 101 Tenn. 222, 47 S. W. Rep. 416.

ment of this chapter the matter of this section has been transposed to sections 91e and 91j, to which the reader is referred.

§ 100a. **Interfering with access, light and air by change of grade not a taking.**—It has already been shown that the private rights of access, light and air are subject to the right of the public to use and improve the street for highway purposes.<sup>18</sup> As these rights are subject to the right of the public to improve, it follows that when such improvements are made no private right is interfered with and consequently that no private property is taken. This is the ground upon which the prevailing doctrine as to change of grade must rest. If the rights of access, light and air are subject to the right of the public to improve, then when access is rendered less convenient by the exercise of that right by the public, or the light and air are obstructed thereby, the owner has no legal ground of complaint.

§ 100b. **Peculiar and extraordinary changes of grade, and changes for some ulterior purpose other than the improvement of the street.**—The doctrine that the rights of abutting owners are subject to the right of the public to grade and improve streets, is one which has often resulted in great hardship to individuals. This is a reason why the doctrine should be restricted, so far as is consistent with sound legal principles. The doctrine is founded upon the theory that when a street is established there is taken into consideration the fact that future improvements of the street may necessitate a change in the surface and the land is supposed to be given, or compensation made, with this in view.<sup>19</sup> But it is manifest that only ordinary changes of grade can be thus anticipated, that is, such changes as may be necessary to secure a uniform, even surface for the purpose of facilitating traffic on the street. The rule should cease to apply when the reason of it fails. Consequently the rule should not apply where the grade is changed for some ulterior purpose not connected with the improvement of the street, or when it is made necessary by artificial con-

<sup>18</sup> Ante § 91e.

<sup>19</sup> Ante §§ 91e-91j, 97.

ditions, such as a railroad, canal or bridge. This reasoning is sustained by some of the authorities, but not by all. It has been held that if the grade is raised, not for the purpose of improving the street, but for the purpose of forming a dike, the abutting owner may recover for the damage to his property.<sup>20</sup> So where the change was made for the purpose of procuring material to be used elsewhere.<sup>21</sup> Where a street was on a side hill it was held that a different grade could be established for the two halves of the street, with a retaining wall in the center, without liability to the abutters,<sup>22</sup> but it might reasonably be held that such an improvement was an ordinary one, in view of the contour of the surface. It has been held that a tunnel beneath the surface of the street,<sup>23</sup> or the open approach to a tunnel in the center of the street,<sup>24</sup> do not entitle the abutting owner to compensation. In bridging streams it frequently becomes necessary to place the bridge above the grade of the adjacent shores and to build elevated approaches to it upon the connecting streets. Whether the damage to private property by such approaches is a taking is a question upon which the authorities disagree.<sup>25</sup> So streets are carried

<sup>20</sup> *Shawneetown v. Mason*, 82 Ill. 337; *Winchester v. Stevens Point*, 58 Wis. 350; *City of Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. Rep. 999.

<sup>21</sup> *Mayor etc. of Macon v. Hill*, 58 Ga. 595.

<sup>22</sup> *Yanish v. City of St. Paul*, 50 Minn. 518, 52 N. W. Rep. 925; *Munger v. City of St. Paul*, 57 Minn. 9, 58 N. W. Rep. 601.

<sup>23</sup> *Hodgkinson v. Long Island R. R. Co.*, 4 Edwards Ch. 411; *Adams v. Saratoga & Washington R. R. Co.*, 11 Barb. 414.

<sup>24</sup> *Chicago v. Rumsey*, 87 Ills. 348.

<sup>25</sup> *In Willamette Iron Works v. Oregon Ry. & Nav. Co.*, 26 Or. 224, 37 Pac. Rep. 1016; the defendant was authorized to build

a bridge across the Willamette river between the cities of Portland and East Portland, "for the purpose of travel and commerce, as a railroad, wagon road and passenger bridge, and to charge and collect tolls and fares thereon." In pursuance of such authority it constructed a double-decked steel bridge, the upper deck being for ordinary street traffic and the lower for railroad traffic. An approach was constructed to the upper deck, starting upon Third street at G street and extending along the middle of Third street until near H street, and thence reaching the bridge by a curve. The approach was thirty feet wide, and rose from the grade of G street to a

over railroads by means of a bridge or viaduct with approaches in front of abutting property, which impair or de-

height of thirteen and one-half feet at H street. Though built of timbers, it was, practically, a solid structure. The plaintiff's property abutted on Third street and extended from G street to H street. At G street and for most of the distance there was eighteen feet between the approach and the lot line and eight feet between it and the sidewalk. The inference is that plaintiff did not own the fee of the street. The court held that the structure was an exclusive appropriation of a part of the street to the use of a private corporation, subversive of and repugnant to its use as a public thoroughfare, which could not be made without compensation to the plaintiff. To the point that the approach was a mere change of grade the court says: "The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly untenable. The city of Portland has undoubted plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public street; and, while such permission included as a consequence the con-

struction of a solid roadway above and over the street surface, it does not follow that what was done was in exercise of the power to alter or change the grade of a street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. The primary object of this grant of power is to enable the municipality to make the streets safe and convenient for public travel, and not to divert them from legitimate street purposes to the exclusive use of some private corporation. Conceding, therefore, that defendant occupies this street by lawful authority, and hence its structure is not a nuisance, yet it invades the legal rights of an abutting owner, and is an appropriation of the property of such owner without compensation, which is beyond the power of the legislature or municipality, or both, constitutionally, to authorize or sanction."

The same conclusion was reached in the case of a county bridge in *Frater v. Hamilton County*, 90 Tenn. 661, 19 S. W.

stroy access, or interfere with light and air. These viaducts and their approaches have been put by the courts upon the same footing as an ordinary change of grade and, consequently, are held not to be any additional servitude upon the street or taking of the property rights of abutting owners.<sup>26</sup> There may be a recovery in Ohio, under the peculiar doctrines of that State,<sup>27</sup> and some States give a

Rep. 233. See also *Martin v. Chicago etc. R. R. Co.*, 47 Mo. App. 452; *Wallace v. Kansas City etc. R. R. Co.*, 47 Mo. App. 491.

On the other hand in *Willis v. City of Winona*, 59 Minn. 27, 60 N. W. Rep. 814, an approach to a bridge was constructed in the center of the street in front of plaintiff's property. The approach was twenty-four feet wide and supported on iron columns. The bridge was exclusively for street traffic and was a toll bridge built and maintained by the city. "Our conclusion is," says the court, "that the construction and maintenance of this bridge approach did not impose any additional servitude upon the street, but was a proper street use, and, hence, constitutes no basis for an action in favor of plaintiff for damages." To the same effect are *Sullivan v. Webster*, 16 R. I. 33, 11 Atl. Rep. 771; *Newport & Cinn. Bridge Co. v. Foote*, 9 Bush 264; *Walsh v. Milwaukee*, 95 Wis. 16. See also *Garrett v. Lake Roland El. R. R. Co.*, 79 Md. 277, 29 Atl. Rep. 830, 10 Am. R. R. & Corp. Rep. 39. In the latter case the defendant railroad company built a causeway about fifteen feet wide in the center of a street, to form the approach to a bridge by which the railroad

was carried over another railroad. The causeway was of masonry and left less than ten feet between it and the curb. It was nine feet high at the bridge and declined to the grade of the street. Plaintiff owned lots abutting on the street opposite, but did not own the fee of the street. Held, that the interference with access and other injury to plaintiff's property did not constitute a taking thereof within the meaning of the Constitution.

<sup>26</sup> *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. Rep. 457; *Hart v. Atlanta*, 100 Ga. 274; *Schneider v. City of Detroit*, 72 Mich. 240, 40 N. W. Rep. 329; *Robinson v. Great Northern R. R. Co.*, 48 Minn. 445, 51 N. W. Rep. 384; *Conklin v. New York etc. R. R. Co.*, 102 N. Y. 107, 6 N. E. Rep. 663; *Ottenot v. New York etc. R. R. Co.*, 119 N. Y. 603, 23 N. E. Rep. 169; *Home Bldg. etc. Co. v. City of Roanoke*, 91 Va. 52, 20 S. E. Rep. 895. A viaduct was held not to be a mere change of grade in *Manhattan R. R. Co. v. New York*, 89 Hun 429, 35 N. Y. Supp. 505; *Schneider v. Detroit*, 72 Mich. 240, 40 N. W. Rep. 329; *Leonard v. Cassidy*, 8 Ohio C. C. 529; *Colclough v. Milwaukee*, 92 Wis. 182, 65 N. W. Rep. 1039.

<sup>27</sup> *Cohen v. Cleveland*, 43 Ohio



remedy in such cases by statute.<sup>28</sup> So the abutter may recover in such cases where the constitution guarantees compensation for property damaged, injured or destroyed.<sup>29</sup> The same principles apply to the viaduct as to a grade crossing, where the railroad is above or below the established grade and approaches have to be constructed by raising or lowering the grade of the street. This class of cases is elsewhere considered.<sup>30</sup> A change of grade for the benefit of a railroad company was held to be unauthorized.<sup>31</sup>

§ 101. Lowering grade.—Interfering with support of soil.—We have stated in a previous section the reasons in support of the position that the abutting owner has a right to the support of his soil in that of the street.<sup>32</sup> It follows that an interference with this right, by cutting down a street and removing the support of the adjacent soil, is a taking for which compensation must be made. It must be confessed, however, that the weight of authority is against this position.<sup>33</sup> The older cases make no distinction between the different kinds of damages which may be occasioned to abutting property by the improvement of the streets. All such damages are treated as consequential and

St. 190; *Lake Shore etc. R. R. Co. v. Brown*, 16 Ohio C. C. 269; ante § 98.

<sup>28</sup> *Nicks v. Chicago etc. R. R. Co.*, 84 Ia. 27, 50 N. W. Rep. 222; *Parker v. Boston & M. R. R. Co.*, 3 Cush. 107; *Kelly v. City of Minneapolis*, 57 Minn. 294, 59 N. W. Rep. 304; *Read v. City of Camden*, 54 N. J. L. 347, 24 Atl. Rep. 549, reversing 53 N. J. L. 322, 21 Atl. Rep. 565.

<sup>29</sup> *Bentley v. City of Atlanta*, 92 Ga. 623, 18 S. E. Rep. 1013; *Beaver v. City of Harrisburg*, 156 Pa. St. 547, 27 Atl. Rep. 4; *Cass v. Pennsylvania R. R. Co.*, 159 Pa. St. 273, 28 Atl. Rep. 161; *Walters v. St. Louis*, 132 Mo. 1, 33 S. W. 441; *Fred v. Kansas*

*City Cable R. R. Co.*, 65 Mo. App. 121; *Omaha v. McGavock (Neb.)*, 66 N. W. Rep. 415; post § 223a.

<sup>30</sup> Post § 118.

<sup>31</sup> *Zehren v. Milwaukee Electric R. R. Co.*, 99 Wis. 83.

<sup>32</sup> Ante § 91j. See also post § 151.

<sup>33</sup> *Mayor etc. of Rome v. Omberg*, 28 Ga. 46; *Mitchell v. Mayor etc. of Rome*, 49 Ga. 19; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Fellows v. City of New Haven*, 44 Conn. 240; *City of Delphi v. Evans*, 36 Ind. 90; *Mears v. Commissioners of Wilmington*, 9 Ired. L. 73; *Cheever v. Shedd*, 13 Blatch. 258; *Callendar v. Marsh*, 1 Pick. 418; *City of Quincy v. Jones*, 76 Ills. 231.

remediless. Yet, in some of these cases, and in others by the same courts, the rights and liabilities of the public with respect to the adjoining owner are held to be governed by the law of adjoining proprietors. But adjoining proprietors have mutual rights of support, and, if the analogy is carried out, it must be held that the adjacent owner has a right to the support of his soil in that of the street. This seems to us the juster view, and some of the more recent cases have so adjudicated.<sup>34</sup> In such cases recovery may be had for injury to improvements where their weight did not cause the slide.<sup>35</sup> Where the excavation of a street causes a slide which reaches property not abutting on the street, the right to compensation would seem to be clear since it

<sup>34</sup> *Dyer v. St. Paul*, 27 Minn. 457; *Armstrong v. St. Paul*, 30 Minn. 299; *Keating v. Cincinnati*, 38 Ohio St. 141; *Aurora v. Fox*, 78 Ind. 1; and see *Moore v. Albany*, 98 N. Y. 396.

We are not aware of any decision rendered since the former edition that is opposed to the conclusion stated in the text, while the following have been made in accordance therewith. *Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. Rep. 84; *Kuschke v. St. Paul*, 45 Minn. 225, 47 N. W. Rep. 786; *Farrell v. St. Paul (Minn.)*, 64 N. W. Rep. 809; *Stearns Ex'r v. City of Richmond*, 88 Va. 992, 14 S. E. Rep. 847, 6 Am. R. R. & Corp. Rep. 247; *Parke v. City of Seattle*, 5 Wash. 1, 31 Pac. Rep. 310, 32 Pac. Rep. 82; *City of New Westminster*, 20 Duvall, 520; *Columbus v. Willard*, 7 Ohio C. C. 113. In the first of these cases it is said: "Every person has a right ex jure naturae to the lateral support of the adjoining soil, and is entitled to damages for its re-

moval. A municipal corporation has no greater rights or powers in that regard over the soil of the streets than a private owner has over his own land, and will be liable in damages for removing this lateral support the same as would a private owner if improving his property for his own use. It is no defence that the excavation was necessary for the purpose of grading the street. If the city desires greater rights than those possessed by private owners it must acquire them by the exercise of eminent domain. It must either do this, or else itself substitute other lateral support in place of the soil which it removes. The liability of the city in these cases does not depend, as appellant assumes, upon its negligence in making the excavation. This right of the right of the lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence."

<sup>35</sup> *Keating v. Cincinnati*, 38 Ohio St. 141.

cannot be presumed that the owner was compensated therefor when the street was established.<sup>36</sup>

**§ 102. Raising grade. — Encroachment of the filling. —** The right of exclusion, or the right of complete possession and enjoyment, is one of the essential elements of property in land. If any one has a right to encroach upon my land in any way, then I have not complete control of it, nor a full and absolute property in it. The public have no right, in raising the grade of a street, to allow the filling to slide or encroach upon the adjoining land. Such an occupation of or encroachment upon adjacent property is a taking.<sup>37</sup> Such a direct invasion of one's property is without right and might undoubtedly be enjoined. It is the duty of the

<sup>36</sup> *Keating v. Cincinnati*, 38 Ohio St. 142.

<sup>37</sup> *Dodson v. Cincinnati*, 34 Ohio St. 276; *Bradwell v. City of Kansas*, 75 Mo. 213; *Hendershott v. Ottumwa*, 46 Ia. 658; *Town of West Covington v. Schultz*, (Ky.) 30 S. W. Rep. 410; *Vanderlip v. Grand Rapids*, 79 Mich. 322, 41 N. W. Rep. 677; *Overman v. St. Paul*, 39 Minn. 120, 39 N. W. Rep. 66; *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. Rep. 149; *Koch v. Sackman-Phillips Inv. Co.*, 9 Wash. 405, 37 Pac. Rep. 703. In *Bradwell v. City of Kansas*, 75 Mo. 213, the defendant raised the grade of a street about even with the top of plaintiff's house, and the filling encroached upon his lot to such an extent as to crush and ruin his house. The court say: "Moreover, section 16 article 1 of the Constitution of 1865, provided that: 'no private property ought to be taken or applied to public use, without just compensation.' Here the city and its servant took the property

of plaintiff's within the meaning of that section. The taking of property within that prohibition may be either total or absolute, or a taking pro tanto. Any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government which directly and not merely incidentally affects it, is to that extent an appropriation." See *West Covington v. Schultz*, (Ky.) 30 S. W. Rep. 410, 660; *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. 530; *Harley v. Jones*, 165 Pa. St. 34, 30 Atl. Rep. 499.

To the contrary: *Fellows v. City of New Haven*, 44 Conn. 240; *Shaw v. Crocker*, 42 Cal. 435; *Mayo v. Springfield*, 136 Mass. 10; *Mayo v. Same*, 138 Mass. 70; and see *Moore v. Albany*, 98 N. Y. 396; *Carll v. Northport*, 11 App. Div. 120, 42 N. Y. Supp. 576.

public in such a case to support the filling by a retaining wall in the street itself. But if this is not done and an action is brought for damages and a recovery had, the public thereby acquire a right of lateral support for the causeway in the street.<sup>38</sup> If the property is vacant, the damages could hardly exceed the cost of a retaining wall and of removing the filling which had fallen upon the lot. If the property is improved, any injury to the improvements would be included.<sup>39</sup> In *Nelson v. West Duluth*,<sup>40</sup> it is held that the measure of damages is the diminution in the value of the property by reason of the earth being imposed upon it, and that the cost of removing the earth and building a retaining wall cannot be recovered, if it is more than such diminution.

§ 103. **Damages from surface water.**—*Nevins v. City of Peoria*,<sup>41</sup> is a leading case upon this question. The city of Peoria graded its streets in such a manner as to cause a stream of water and mud to flow on to the plaintiff's property in times of rain, and also to cause a pond to accumulate upon adjacent property, which, by becoming stagnant, diffused unwholesome vapors over the plaintiff's premises. The city was held liable, on the ground that the damages complained of were a taking, within the meaning of the constitution.<sup>42</sup> It was held that the city had no greater

<sup>38</sup> *Dodson v. Cincinnati*, 34 Ohio St. 276.

<sup>39</sup> *Bradwell v. City of Kansas*, 75 Mo. 213.

<sup>40</sup> 55 Minn. 497, 55 N. W. Rep. 149.

<sup>41</sup> 41 Ills. 502, 508, 1866.

<sup>42</sup> The court say: "The city is the owner of the streets, and the legislature has given it power to grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would

render a private individual responsible in damages without being responsible itself. Neither State nor municipal government can take private property for public use without due compensation and this benign provision of our constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree." This case has been followed and approved in the following subsequent decisions in the same State: *City of Aurora v. Gillett*, 56 Ills. 132; *City of Aurora v. Reed*, 57 Ills. 29; *City*

power over its streets than a private individual had over his own land, and that the law of adjoining proprietors was applicable. This is the true rule to be applied in all such cases. In any given case, the test is: If an individual owned the streets in question, and had made the same works, would he be liable for the damages complained of? It is now almost uniformly held that, if a city so grades or otherwise improves its streets as to collect surface water in a stream and pour it directly upon private property, it will be liable for the ensuing damages.<sup>43</sup> This is a direct and entirely unauthorized invasion of property rights. There is, however, considerable dissent from this view, especially in the earlier cases.<sup>44</sup> Where a natural outlet for surface

of *Dixon v. Baker*, 65 Ills. 518; *Tearney v. Smith*, 86 Ills. 391. In *Aurora v. Reed* the street in question was improved while the plaintiff's lot was vacant. He afterwards built upon his lot, and the water ran into his basement. It was held that this circumstance made no difference, that he had a right to improve his lot and enjoy it free from any such invasion or annoyance.

<sup>43</sup> *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654; *Indianapolis v. Lawyer*, 38 Ind. 348; *Weis v. Madison*, 75 Ind. 241; *Evansville v. Decker*, 84 Ind. 325; *North Vernon v. Voegler*, 89 Ind. 77; *Crawfordsville v. Bond*, 96 Ind. 236; *Manning v. Lowell*, 130 Mass. 21; *Pennoyer v. Saginaw*, 8 Mich. 296; *Ashley v. Port Huron*, 35 Mich. 296; *Cubit v. O'Dett*, 51 Mich. 347; *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331; *Thurston v. St. Joseph*, 51 Mo. 510; *Field v. West Orange*, 36 N. J. Eq. 118; *Same v. Same*, 29 Alb. L. J. 397; *West Orange v. Field*, 37 N. J. L. 600;

*Byrnes v. Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun 587; *Noonan v. Albany*, 79 N. Y. 470; *Seifert v. Brooklyn*, 101 N. Y. 136; *Rhodes v. Cleveland*, 10 Ohio, 159; *Limerick etc. Turnpike Co.'s Appeal*, 80 Pa. St. 425; *Huddleston v. West Bellevue*, 111 Pa. St. 110; *Inmann v. Trip*, 11 R. I. 520; *Gillison v. Charleston*, 16 W. Va. 282; *Pettigrew v. Evansville*, 25 Wis. 223; *Town of Sullivan v. Phillips*, 110 Ind. 320; *Elgin v. Kimball*, 90 Ill. 356; *City of Elgin v. Welch*, 16 Ill. App. 483; *S. C. 23 Ill. App. 185*; *Torrey v. City of Scranton*, 133 Pa. St. 173, 19 Atl. Rep. 351; *Rowe v. Rochester*, 29 U. C. Q. B. 590; ante § 89, note 31; and see *Commissioners v. Whitsett*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324; *Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. Rep. 605; *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. Supp. 989; *Carll v. Newport*, 11 App. Div. 120, 42 N. Y. Supp. 576.

<sup>44</sup> *Bronson v. Wallingford*, 54 Conn. 513; *Roll v. Augusta*, 34

water is obstructed by raising the grade of a street, and the water is thus caused to accumulate and stand on private property, the corporation will be liable.<sup>45</sup> And so in some States where the water is obstructed and caused to accumulate on the plaintiff's property, though no defined channel or marked depression is interfered with.<sup>46</sup> But where the law of the State is that every owner of land may improve his lot as he pleases, without liability on account of surface water, there will, of course, be no liability on the part of municipal corporations for any interference with the flow of surface water whereby it is dammed back or turned upon private property.<sup>47</sup> In Iowa it is held that, where the

Ga. 326; *Conwell v. Emrie*, 4 Ind. 209; *Vincennes v. Richards*, 23 Ind. 381; *Platter v. Seymour*, 86 Ind. 323; *Cummings v. Seymour*, 79 Ind. 491; *Alden v. Minneapolis*, 24 Minn. 254; *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. City of St. Louis*, 14 Mo. 20; *Hoffman v. St. Louis*, 15 Mo. 651. (Last three cases overruled in *Thurston v. St. Joseph*, 51 Mo. 510); *Steinmeyer v. St. Louis*, 3 Mo. App. 256; *Foster v. St. Louis*, 4 Mo. App. 564; *Same v. Same*, 71 Mo. 157; *Stewart v. Clinton*, 79 Mo. 603; *Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291; *Mayor etc. of Cumberland v. Willison*, 50 Md. 138; *Durkee v. Town of Union*, 38 N. J. L. 21; *Kavanaugh v. Brooklyn*, 38 Barb. 232; *Mills v. Brooklyn*, 32 N. Y. 489; *Lynch v. Mayor etc. of New York*, 76 N. Y. 60; *Wright v. Wilmington*, 92 N. C. 156; *Wakefield v. Newell*, 12 R. I. 75; *Allen v. Chippewa Falls*, 52 Wis. 430; *Waters v. Bay View*, 61 Wis. 642; *Heth v. Fond du Lac*, 63 Wis. 228; see also the following cases where the lots were below

grade: *Freyburg v. Davenport*, 63 Ia. 119; *Gilfeather v. Council Bluffs*, 69 Ia. 310; *Morris v. Council Bluffs*, 67 Ia. 343; *Hessing v. District of Columbia*, 3 Mackey, 572; *Gilluly v. Madison*, 63 Wis. 518; *Hirth v. Indianapolis*, 18 Ind. App. 673; *Hart v. Baraboo*, 101 Wis. 368; *Yager v. Fairmont*, 43 W. Va. 259.

<sup>45</sup> *Kemper v. Louisville*, 14 Bush (Ky.) 87; *McClure v. City of Red Wing*, 28 Minn. 186. A similar case was differently decided in *Hoyt v. Hudson*, 27 Wis. 656, where it was held that the defendant was not liable for obstructing a ravine which formed the natural outlet of surface water.

<sup>46</sup> See ante §§ 89, 89a.

<sup>47</sup> *Willson v. Mayor etc. of New York*, 1 Denio, 595; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Gould v. Booth*, 66 N. Y. 62; *Walter v. County Commissioners*, 35 Md. 385; *Sprague v. Worcester*, 13 Gray, 193; *Dickinson v. Worcester*, 7 Allen, 19; *Hoyt v. Hudson*, 27 Wis. 656; *Herring v. District of Columbia*, 3 Mackey, 572; *Davis v. City of Crawfordville*, 119

injury to adjoining property could be foreseen, and it was practicable and reasonable to prevent it by the construction of sewers and culverts, it is the duty of the corporation to do so, and that for neglect of this duty it will be liable.<sup>48</sup> The liability is put upon the ground of a want of care and skill in the construction of the works.<sup>49</sup> Where surface water is caused to accumulate in a pond which, by becoming stagnant, diffuses unwholesome vapors over the neighborhood, the corporation will be liable, provided the accumulation is due to its wrongful act as by obstructing a natural outlet for such water.<sup>50</sup> The subject of surface water, and liability for interference with the flow of the same, are treated in a former chapter.<sup>51</sup>

§ 104. **Interfering with natural streams.**—Where a municipal corporation, in improving its streets or in building

Ind. 1, 21 N. E. Rep. 449; *Rose v. St. Charles*, 49 Mo. 509; *Imler v. Springfield*, 55 Mo. 119; *Watson v. City of Kingston*, 114 N. Y. 88, 21 N. E. Rep. 102; *Acker v. Town of New Castle*, 48 Hun 312, 15 N. Y. St. 894, 1 N. Y. Supp. 223; *Anchor Brewing Co. v. Village of Dobbs Ferry*, 84 Hun 274, 32 N. Y. Supp. 371; *Bush v. City of Portland*, 19 Or. 45, 23 Pac. Rep. 667; *Lafferty v. Girardville*, 1 Monaghan (Pa. Supm.) 513; and see *Lander v. City of Bath*, 85 Me. 141, 26 Atl. Rep. 1091; *Almy v. Coggeshall*, 19 R. I. 549. So held also where a natural watercourse was intercepted; *Mayor etc. of Philadelphia v. Randolph*, 4 W. & S. 514.

<sup>48</sup> *Cotes v. Davenport*, 9 Ia. 227; *Templin v. Iowa City*, 14 Ia. 59; *Ellis v. Same*, 29 Ia. 229; *Damour v. Lyons City*, 44 Ia. 276; *Russell v. Burlington*, 30 Ia. 262; *Ross v. Clinton*, 46 Ia. 606; *Powers v. Council Bluffs*, 50 Ia. 197; see also *Commissioners of Ken-*

*sington v. Wood*, 10 Pa. St. 93; *Rowe v. Addison*, 34 N. H. 306; *Parker v. Nashau*, 59 N. H. 402; *Clark v. Rochester*, 43 Hun 271.

<sup>49</sup> See also *Los Angeles Cemetery Ass. v. Los Angeles*, 103 Cal. 461, 37 Pac. Rep. 375; *Princeton v. Gieske*, 93 Ind. 102; *Benson v. Wilmington*, 9 Houston, 359; *Haney v. City of Kansas*, 94 Mo. 334, 7 S. W. Rep. 417; *Rutherford v. Holley*, 105 N. Y. 632.

<sup>50</sup> *Nevins v. Peoria*, 41 Ills. 502; *Weeks v. Milwaukee*, 10 Wis. 242; *Smith v. Milwaukee*, 18 Wis. 63; *Clark v. Rochester*, 43 Hun 271; and see ante §§ 86, 89, 89a. Contra: *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Taylor v. St. Louis*, 14 Mo. 20; *Russell v. Burlington*, 30 Ia. 262; *Allen v. City of Paris*, 1 Tex. App. Civil Cas. p. 506; and see *Corcoran v. City of Benicia*, 96 Cal. 1, 30 Pac. Rep. 798; *Watson v. Kingston*, 43 Hun 367.

<sup>51</sup> Ante §§ 88-89a.

or repairing a bridge, interferes with the flow of a natural stream, it will be liable for any damage resulting to private property.<sup>52</sup> If a city substitutes a drain or sewer of insufficient capacity for a natural watercourse, and the water is set back upon private property, it will be liable.<sup>53</sup> And, generally, a city interferes with a stream of water at its peril.<sup>54</sup>

§ 105. **Unlawful change of grade.**—A recovery may be had in all cases where the change of grade is unlawful,<sup>55</sup> as when the statute requires the consent of a certain proportion of the property holders, and the change is made without such consent,<sup>56</sup> or provides that the work shall not be

<sup>52</sup> Mayor etc. of Helena v. Thompson, 29 Ark. 569; McCord v. High, 24 Ia. 336; Lawrence v. Inhabitants of Fairhaven, 5 Gray, 110; Perry v. Worcester, 6 Gray 544; Stone v. Augusta, 46 Me. 127; but see Mayor etc. of Philadelphia v. Randolph, 4 W. & S. 514; Ely v. Rochester, 26 Barb. 133.

<sup>53</sup> Mayor etc. of Helena v. Thompson, 29 Ark. 569. A similar case was differently and it seems to us wrongly decided in Collins v. Philadelphia, 93 Pa. St. 272.

<sup>54</sup> In McMahon v. Council Bluffs, 12 Ia. 268, it was held that a bill would not lie to prevent a city changing the bed of a stream so as to cause the same to flow in the street in front of the plaintiff's property. On the subject of interfering with the flow of streams see the last chapter.

<sup>55</sup> Hill v. St. Louis, 59 Mo. 412; Freeland v. City of Muscatine, 9 Ia. 461; Roberts v. Chicago, 26 Ills. 249; Leman v. Mayor etc of New York, 5 Bos. 414; Meinzer

v. Racine, 68 Wis. 241; Lafayette v. Nagle, 113 Ind. 425; City of Topeka v. Sells, 48 Kan. 520, 29 Pac. Rep. 604; Schneider v. City of Detroit, 72 Mich. 240, 40 N. W. Rep. 329; Rakowsky v. City of Duluth, 44 Minn. 188, 46 N. W. Rep. 338; Themanson v. City of Kearney, 35 Neb. 881, 53 N. W. Rep. 1009; Drummond v. City of Eau Claire, 85 Wis. 556, 55 N. W. Rep. 1028; Ayres v. Windsor, 14 Ont. 682; West v. Parkdale, 15 Ont. 319. But see West v. Parkdale, 12 U. C. App. 393. The power to establish grades must be strictly pursued. State v. City of Bayonne, 54 N. J. L. 293, 23 Atl. Rep. 648; State v. Borough of Rutherford, 55 N. J. L. 450, 26 Atl. Rep. 933; Farrell v. St. Paul, (Minn.) 64 N. W. Rep. 809; Feuerstein v. Jackson, 8 Ohio C. C. 396; Fisher v. Naysmith, 106 Mich. 71, 64 N. W. Rep. 19; Blanden v. Ft. Dodge, 102 Ia. 441; Paine v. Lettsville, 103 Ia. 481; Sweet v. Conley, 20 R. I. 381, 39 Atl. Rep. 326.

<sup>56</sup> Crossett v. Janesville, 28 Wis. 420; Mott v. Mayor etc. of



done until after an assessment of benefits to defray the expense has been confirmed, and such provision is disregarded,<sup>57</sup> or requires a two-thirds vote of the city council which is not obtained,<sup>58</sup> or when the change is made by a railroad company or individuals without authority.<sup>59</sup> A city was held liable where the grade of a street was changed, not for the purpose of improving the street, but to get material to be used in other parts of the city.<sup>60</sup> An unauthorized change of grade may be made valid by ratification,<sup>61</sup> or by act of the legislature.<sup>62</sup> In such case it has been held that a party injured can only recover the damages sustained between the making of the change and the ratification or confirmation.<sup>63</sup> It is held that an unauthorized change of grade may be enjoined.<sup>64</sup> Where a city could only change a grade by ordinance, and a change was made without an ordinance, it was held the city was not liable, though the persons executing the work would be.<sup>65</sup>

§ 106. When the work is negligently done.—Damages which result from negligence or unskillfulness in doing the

New York, 2 Hilton, 358; *Fohnsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. Rep. 821, affirming S. C. 66 Hun 214, 21 N. Y. Supp. 42.

<sup>57</sup> *Dore v. Milwaukee*, 42 Wis. 108.

<sup>58</sup> *Trustees of P. E. Church v. Anamosa*, 76 Ia. 538, 41 N. W. Rep. 313.

<sup>59</sup> *Karst v. St. Paul S. & T. F. R. R. Co.*, 22 Minn. 118; *Same v. Same*, 23 Minn. 401; *Price v. Knott*, 8 Oreg. 438; *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. Rep. 834; *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. Rep. 22; *Gebling v. City of St. Joseph*, 49 Mo. App. 430.

<sup>60</sup> *Mayor etc. of Macon v. Hill*, 58 Ga. 595.

<sup>61</sup> *Appeal of McCormick*, 165 Pa. St. 386, 30 Atl. Rep. 986;

*Wolfe v. Pearson*, 114 N. C. 627, 19 S. E. Rep. 264.

<sup>62</sup> *Himmelmann v. Hoadley*, 44 Cal. 213; *Hoadley v. San Francisco*, 50 Cal. 265.

<sup>63</sup> *Wolfe v. Pearson*, 114 N. C. 627, 19 S. E. Rep. 264.

<sup>64</sup> *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. Rep. 834; *Koeffler v. City of Milwaukee*, 85 Wis. 397, 55 N. W. Rep. 400; and see *Mayor etc. of Baltimore v. Porter*, 18 Md. 284.

<sup>65</sup> *Gebling v. City of St. Joseph*, 49 Mo. App. 430; *Beatty v. City of St. Joseph*, 57 Mo. App. 251. And so where the grade was raised above the established grade by mistake of the city engineer in giving the grades. *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. Rep. 687.

work are actionable.<sup>66</sup> In such cases the question of a taking does not arise. The gist of the action is negligence, and the recovery is limited to such damages as result from that cause.

§ 107. **Power to establish grades a continuing one.**—It is immaterial whether the damages complained of are caused by bringing the natural surface of the street into conformity with the first established grade, or by changing a grade already established. The power to improve and graduate streets is a continuing power, which municipal corporations or public authorities possess for the public benefit, and which is not exhausted by the first exercise nor capable of being bargained away. This question first arose in a very early case in the Supreme Court of the United States.<sup>67</sup> The corporation of Georgetown, having power to graduate and level streets, passed an ordinance to fix the grade of certain streets, and provided that the grade so established should forever thereafter be considered as the true graduation of the streets so graduated and be binding upon the corporation and all other persons whatever, and be forever thereafter regarded in making improvements on said streets. The plaintiff improved his lot with reference to the grade so established, and the corporation afterwards passed an ordinance changing the grade. The suit was to enjoin the change. The court held that the plaintiff had no remedy, that the power in question was a continuing one, and that the corporation could not, by contract or otherwise, abridge or annul its legislative functions. All the authorities are in accord with this decision.<sup>68</sup>

§ 108. **Power of city to make compensation.**—The justice

<sup>66</sup> *Smith v. City Council of Alexandria*, 33 Gratt. 208; *Wegmann v. City of Jefferson*, 61 Mo. 55; *Thompson v. Booneville*, 61 Mo. 282; *Werth v. Springfield*, 78 Mo. 107; *Mears v. Wilmington*, 9 Ired. L. 73; *North Vernon v. Voegler*, 103 Ind. 314.

<sup>67</sup> *Goszler v. Georgetown*, 6 Wheat. 593.

<sup>68</sup> *Keasy v. Louisville*, 4 Dana, 154; *Creal v. Keokuk*, 4 G. Greene, Ia. 47; *Russell v. Burlington*, 30 Ia. 262; *Kokomo v. Mahon*, 100 Ind. 242; *Peddicord v. Baltimore etc. H. R. R. Co.*, 34 Md. 463; *City of Pontiac v. Carter*, 32 Mich. 164; *Hoffman v. St. Louis*, 15 Mo. 651; *Schattner v. City of Kansas*, 53 Mo. 162;

of the claim for compensation in such cases is so plain, that any public corporation would undoubtedly be sustained by the courts in the voluntary discharge of such a claim. And where a city, by ordinances, establishes a grade and pledges its faith that such grade shall not thereafter be changed to the injury of any individual without full compensation, the city will be compelled to live up to its pledge.<sup>69</sup>

§ 109. **Miscellaneous cases.**—A city is not liable for inconvenience occasioned by a ditch along a street which is constructed under proper authority, even though it becomes enlarged by erosion so as greatly to impair access to adjoining property.<sup>70</sup> Where a turnpike company takes a highway, it will have the same right to repair and improve it as the highway commissioners, and will not be liable for consequential damages for which the commissioners are not liable.<sup>71</sup> No recovery can be had for damage to business during the progress of improvements on a street.<sup>72</sup> Where the charter of a city provided that the council should establish the general grade of its streets as soon as practicable, and that the city should pay for damages caused by any change of such grades, in a case arising under the charter it was held that the court could not determine when it was practicable for the city to establish general grades, and consequently could not cast the city in damages on the ground of neglect to comply with the law.<sup>73</sup> Where it was shown

Waddell v. Mayor etc. of New York, 8 Barb. 95; Rounds v. Mumford, 2 R. I. 154; Matter of Furman Street, 17 Wend. 649; Reynolds v. Mayor etc. of Shreveport, 13 La. An. 426; Macy v. Indianapolis, 17 Ind. 267; Methodist Episcopal Church v. Wyandotte, 31 Kan. 721; City of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. Rep. 354; Columbus Gas Light etc. Co. v. City of Columbus, 50 Ohio St. 65, 33 N. E. Rep. 292; Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. Rep. 665, 6 Am. R. R. &

Corp. Rep. 88; Wabash v. Defiance, 52 Ohio St. 262, 40 N. E. Rep. 89.

<sup>69</sup> Goodall v. Milwaukee, 5 Wis. 32; and see Fisk v. Springfield 116 Mass. 88.

<sup>70</sup> Lambar v. St. Louis, 15 Mo. 610; Benjamin v. Wheeler, 8 Gray, 409; but see Carondelet Canal & Nav. Co. v. New Orleans, 38 La. An. 308.

<sup>71</sup> Dexter v. Broat, 16 Barb. 337.

<sup>72</sup> Plant v. Long Island R. R. Co., 10 Barb. 26.

<sup>73</sup> Schattner v. City of Kansas, 53 Mo. 162.

that a proposed change of grade would render the street impassable, and be no benefit but a detriment to the public, it was held that a bill would lie to enjoin the change.<sup>74</sup>

§ 109a. **Right to compensation for change of grade under statutes and recent constitutions.**—The right to compensation for a change of grade under statutes specially providing therefor, and under recent constitutions giving compensation for property damaged or injured, as well as for property taken, is treated of in a subsequent chapter.<sup>75</sup>

### III.—RAILROADS IN STREETS.

§ 110. **In general.**—It is common all over the country for railroads to be laid down upon the streets of cities and villages. The loss which has been occasioned to individuals by this means is very great; the suits which have been instituted to recover for such loss are very numerous; the decisions which have been rendered therein by the different courts, and even by the same courts at different times, are conflicting and irreconcilable.<sup>76</sup> "Few questions," says the New York Court of Appeals, "have come before the courts in this generation of greater practical importance, or involving larger pecuniary interests, than those growing out of the construction of railways in city streets."<sup>77</sup>

§ 110a. **Classification of railroads.**—Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches and methods of operation and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes; (1) commercial railroads, and (2) street railroads. Commercial railroads embrace all railroads for general freight and pas-

<sup>74</sup> *Armstrong v. St. Louis*, 3 Mo. App. 151.

<sup>75</sup> Post chap. viii.

<sup>76</sup> This was said in the first edition and has been greatly em-

phasized by the litigation since that time.

<sup>77</sup> *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278; S. C. Sub. Nom. Duycknick

senger traffic between one town and another, or between one place and another.<sup>78</sup> So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways except for short distances. Street railroads embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers with their ordinary hand luggage from one point to another on the street.<sup>79</sup> Street passenger railroads exist in great variety as regards their modes of construction and operation and may be classified as follows: (1) Horse railroads. (2) Elevated railroads. (3) Cable roads. (4) Steam motor railroads. (5) Electric railroads. (6) Under ground railroads. As different conclusions have been reached by the same courts regarding the use of streets for these different sorts of roads, we shall consider them separately.

An electric railroad proposed to be built on roads and streets between Milwaukee and Kenosha and authorized to carry freight and passengers, express and mail matter, was held to be a commercial railroad.<sup>80</sup>

§ 111. Is a commercial railroad a legitimate use of a street or highway?—If this question is answered in the affirmative, it is plain that the abutting owner cannot recover for any damage resulting from such use. And so

v. New York El. R. R. Co., 3 Am. R. R. & Corp Rep. 744.

<sup>78</sup> This class of railroads is most generally referred to as the "ordinary steam railroad." See 2 Dill. Munic. Corp., § 725. They are called "Railroads for general traffic" by Caldwell, J., in *Williams v. City Electric Street R. R. Co.*, 41 Fed. Rep. 556. They are also called "Commercial railroads" as in *Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112, 119; *East End St. R. R. Co. v. Doyle*, 88 Tenn. 747, 2 Am. R. R. & Corp Rep., 747, and *Nichols v. Ann Arbor etc. R. R.*

*Co.*, 87 Mich. 361, 49 N. W. Rep. 538. The phrase "Commercial railroads" is employed in many other cases cited in the following sections.

<sup>79</sup> *Nichols v. Ann Arbor etc. R. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538, 541; *Williams v. City Electric Street R. R. Co.*, 41 Fed. Rep. 556; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. R. & Corp. Rep. 287; *Harvey v. Aurora etc. R. R. Co.*, 174 Ill. 295.

<sup>80</sup> *Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 95 Wis. 561.

the answer to this question may dispose of the whole subject. To us it seems so clear that a railroad is foreign to the legitimate uses of a highway, that we never have been able to understand how a court could reach a contrary conclusion. Highways are established to accommodate the public in traveling from place to place. From time immemorial, prior to the discovery of steam, they were for the common use of every citizen, by any means of locomotion he chose to select. They were not used by one person in any way which was not open to all. No one had a private right or any exclusive privilege therein. It was free to all upon like conditions. Such being the character of the public highway, it was subject to use by any new means of locomotion which could be employed by all the public, and was not destructive of the old methods of travel. A carriage propelled upon the ordinary surface of the road by steam or electricity would be just as legitimate as a carriage drawn by horses. Such use would be equally open to every citizen. The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street,<sup>81</sup> inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks which would practically exclude all ordinary travel and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence. We shall not review the authorities or attempt to reconcile them. They will be found in the note.<sup>82</sup>

<sup>81</sup> *New Orleans v. Spanish Fort & Lake R. R. Co. v. Delamore*, 114 U. S. 501.

<sup>82</sup> We shall cite in this note only cases in which the particular point is discussed. The same point is involved in other cases subsequently cited.

First, cases holding a railroad

not to be one of the legitimate uses of a street: *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; but see *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *South Carolina R. R. Co.*

The question first arose in this country in case of Philadelphia & Trenton R. R. Co., decided in 1840.<sup>83</sup> The case was certiorari to review proceedings for the location of the road. The location had been made upon certain streets in

v. Steiner, 44 Ga. 546; Cox v. Louisville R. R. Co., 48 Ind. 178; Kucheman v. C. C. & D. Ry. Co., 46 Ia. 366; Indianapolis etc. R. R. Co. v. Hartley, 67 Ills. 439; Phipps v. West Maryland R. R. Co., 66 Md. 319; Springfield v. Connecticut Riv. R. R. Co., 4 Cush. 63, 71; Grand Rapids & Indiana R. R. Co. v. Heisel, 47 Mich. 393; Harrington v. St. Paul & Sioux City R. R. Co., 17 Minn. 215; Hastings & Grand Island R. R. Co. v. Ingalls, 15 Neb. 123; Williams v. New York Central R. R. Co., 16 N. Y. 97; Fanning v. Osborn & Co., 34 Hun 121; Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Railroad Company v. Williams, 35 Ohio St. 168; Ford v. Chicago & N. W. R. R. Co., 14 Wis. 609; Carl v. Sheboygan & Fond du Lac R. R. Co., 46 Wis. 625; Western Ry. of Ala. v. Ala. G. T. R. R. Co., 96 Ala. 272, 11 So. Rep. 483; Reichert v. St. Louis R. R. Co., 51 Ark. 491; Denver etc. R. R. Co. v. Domke, 11 Col. 247; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. Rep. 629; Theobald v. Louisville etc. R. R. Co., 66 Miss. 279, 6 So. Rep. 230; Fobes v. Rome etc. R. R. Co., 121 N. Y. 505, 24 N. E. Rep. 919, 3 Am. R. R. & Corp. Rep. 182; Syracuse Solar Salt Co. v. Rome etc. R. R. Co., 67 Hun 153, 22 N. Y. Supp. 321; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103;

Lawrence R. R. Co. v. O'Hara, 48 Ohio St. 343, 28 N. E. Rep. 175; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; Hodges v. Seaboard etc. R. R. Co., 88 Va. 653, 14 S. E. Rep. 380; Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co., 95 Wis. 561; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. Rep. 849.

Second, cases holding the contrary: Milburn v. Cedar Rapids, 12 Ia. 246; Cook v. Burlington, 36 Ia. 357. These cases are overruled by 46 Ia. 366, ante. Moses v. Pittsburgh etc. R. R. Co., 21 Ills. 516; Murphy v. Chicago, 29 Ills. 279. These cases are also overruled by 67 Ills. 439, ante. But see City of Olney v. Wharf, 115 Ills. 519; Porter v. North Missouri R. R. Co., 33 Mo. 128; Chapman v. Albany & Schnecktady R. R. Co., 10 Barb. 360; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; Faust v. Passenger Ry. Co., 3 Phil. R. 164; Garnett v. Jacksonville etc. R. R. Co., 20 Fla. 889; Montgomery v. Santa Ana & W. R. R. Co., 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; Fulton v. Short Route R. R. Trans Co., 85 Ky. 640, 4 S. W. Rep. 332; Werges v. St. Louis etc. R. R. Co., 35 La. An. 641; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; and see cases cited in the following sections.

<sup>83</sup> 6 Wharton, 25.

pursuance of the charter of the company which authorized such use of the streets without providing for any compensation to the abutting owners. It was contended that the charter was invalid because it took the property of the abutters without compensation and because such use of the streets was "in derogation of the public and private uses to which they had been applied." The proceedings were affirmed and the most absolute control of the State over the streets asserted. The court says: "What is the dominion of public over such a street? In England a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania, it is the property of the people, not of a particular district, but of the whole State; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control."

The question arose almost simultaneously in the State of New York, in *Fletcher v. The Auburn & Syracuse R. R. Co.*<sup>84</sup> The defendant constructed its road across a highway near plaintiff's premises, on an embankment four feet high, in such manner as to impede access thereto and to cause them to be frequently inundated with water. The defendants were duly authorized by the legislature, but the court say that this authority was only intended to protect the company from indictment for a public nuisance, and not against claims for private damages arising from consequential injury to adjacent owners, and, further, that if, by a fair construction of the grant, the power conferred was broad enough to protect the company against consequential damages to private interests, the grant, to that extent, would be void, since it would be a violation of the fundamental law of the land. The right to recover was based upon the constitution and treated as a matter beyond doubt. This doctrine was affirmed in a similar case which arose a year later in the same court.<sup>85</sup> In the latter case it was urged that the use of the highway by the defendant

<sup>84</sup> 25 Wend. 462, 1841.

& *Rochester R. R. Co.*, 3 Hill,

<sup>85</sup> *Trustees etc. v. The Auburn* 567, 1842.



was only in accordance with the original design for which the way was laid out, viz., the accommodation of the public, and that for this compensation had been made. But the court held that the railroad was a new and distinct user, different from the original design, and constituted an additional burden or easement on the land.<sup>86</sup> Following these cases are a number of decisions in the Supreme Court in which the doctrine is maintained that a railroad, upon a public street, is a use in accordance with the legitimate purposes of a street, being simply a new and improved mode of public travel.<sup>87</sup> The law of the State was, however, finally established by the Court of Appeals in favor of the earlier cases, in *Williams v. New York Central R. R. Co.*<sup>88</sup> It can now be safely said that the weight of authority is in support of the text.

<sup>86</sup> See also *Mahon v. Utica & Schenectady R. R. Co.*, Hill & Denio's Supplement, 156, 1843.

<sup>87</sup> These cases are *Drake v. Hudson River R. R. Co.*, 7 Barb. 508, 1849; *Plant v. Long Island R. R. Co.*, 10 Barb. 26, 1850; *Chapman v. Albany & Schenectady R. R. Co.*, 10 Barb. 360, 1851; *Adams v. Saratoga & Washington R. R. Co.*, 11 Barb. 414, 1851; *Hentz v. Long Island R. R. Co.*, 13 Barb. 646, 1852; *Milhau v. Sharp*, 15 Barb. 193, 1853; *Williams v. New York Central R. R. Co.*, 18 Barb. 222, 1854; *Covey v. Buffalo, etc., R. R. Co.*, 23 Barb. 482, 1856. In these decisions the cases of *Fletcher v. Auburn & Syracuse R. R. Co.* and *Trustees etc. v. Auburn & Rochester R. R. Co.*, ante, are regarded as distinguishable or as overruled by *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195.

<sup>88</sup> 16 N. Y. 97, 108. The court say: "If the only difference con-

sisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common right of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others; between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railroad company on paying their price?" Again, "The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers, and his iron

§ 112. **Commercial railroad in street.**—Right to compensation generally.—If it be conceded that a railroad is one of the uses for which a street was originally designed, it of course follows that the abutting owner is not entitled to compensation when a railroad is laid in front of his property. In such case the establishment of a railroad on a street does not differ in principle from the establishment of a stage line along the same street or the introduction of some new kind of vehicle. Accordingly, all courts which maintain this doctrine, hold that there is no right to compensation.<sup>89</sup> The doctrine itself is practically obsolete, having been overruled in nearly every State that formerly adopted it.

§ 113. **Right to compensation when fee of street in abutting owner.**—With respect to the interest of the abutting owner, highways may be divided into two classes: First, those in which the public have an easement only; second, those in which the public have the fee.<sup>90</sup> In respect to the

rails, and make a railroad upon a highway. Here, then, are two easements; one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carved out and is a part of the public easement, and is therefore the gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?"

<sup>89</sup> See § 111 note 2 part second; also *Huges v. Miss. & Mo. R. R. Co.*, 12 Ia. 261; *Louisville & Frankfort R. R. Co. v. Brown*, 17 B. Mon. 763; *Elizabethtown &*

*Paducah R. R. Co.*, 79 Ky. 52; *Faust v. Passenger Ry. Co.*, 3 Phil. 164; *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; *Fulton v. Short Route R. R. Trans. Co.*, 85 Ky. 640, 4 S. W. Rep. 332; *Werges v. St. Louis etc. R. R. Co.*, 35 La. An. 641; *Hepting v. New Orleans Pac. R. R. Co.*, 36 La. An. 898; *Neltsey v. Baltimore & O. R. R. Co.*, 5 Mackey 34; *Glick v. Baltimore & O. R. R. Co.*, 19 D. C. 412; *Tate v. M. K. & T. R. R. Co.*, 64 Mo. 149; *Corey v. Buffalo etc. R. R. Co.*, 23 Barb. 482; *Appeal of Philadelphia etc. R. R. Co.*, 2 Walker's Pa. Supm. Ct. Rep. 291; *Yates v. Town of West Grafton*, 34 W. Va. 783, 12 S. E. Rep. 1075.

<sup>90</sup> As to distinctions based

first class, the abutting owner is entitled to every right and advantage, in that part of the street of which he owns the fee, not required by the public. He has the entire right and property in the soil, subject to the easement of the public.<sup>91</sup> The easement of the public is the right to use and improve the street for the purposes of a highway only. A commercial railroad on a street, being foreign to such purposes,<sup>92</sup> is an interference with the adjoining owners' proprietary rights in the soil, and an acquisition or taking of an estate or interest in his land, for which he is entitled to compensation as in other cases.<sup>93</sup> If the abutting

upon the ownership of the fee of streets see ante § 911.

<sup>91</sup> Post § 589.

<sup>92</sup> See ante § 1111.

<sup>93</sup> *Southern Pac. R. R. Co. v. Reed*, 41 Cal. 256; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Nicholson v. New York & New Haven R. R. Co.*, 22 Conn. 73; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ills. 439; *Protzman v. Indianapolis & Cinn. R. R. Co.*, 9 Ind. 467; *Cox v. Louisville R. R. Co.*, 48 Ind. 178 (an elaborate case); *Indiana Central Ry. Co. v. Boden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Dalley*, 12 Ind. 551; *Indianapolis etc. Ry. Co. v. Smith*, 52 Ind. 428; *Terre Haute & Logansport R. R. Co. v. Bissell*, 108 Ind. 113; *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366; *Grand Rapids & Ind. R. R. Co. v. Helsel*, 38 Mich. 62; *S. C. 47 Mich. 393*; *Gray v. First Division of St. Paul & Pacific R. R. Co.*, 13 Minn. 315; *Molitor v. Same*, 14 Minn. 285; *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10

Minn. 82; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Adams v. Hastings & Dakota R. R. Co.*, 18 Minn. 260; *Hartz v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 358; *Phipps v. West Md. R. R. Co.*, 66 Md. 319; *Starr v. Camden etc. R. R. Co.*, 24 N. J. L. 592; *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Washington Cemetery v. Prospect Park & Coney Island R. R. Co.*, 7 Hun 655; *Matter of Prospect Park etc. R. R. Co.*, 13 Hun 345; *Hussner v. Brooklyn City R. R. Co.*, 30 Hun 409; *People v. Law*, 22 How. Pr. 109; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423. For other New York cases see ante § 111. *Parrott v. Cincinnati etc. R. R. Co.*, 10 Ohio St. 624; *Cincinnati etc. R. R. Co. v. Cumminsville*, 14 Ohio St. 523; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Ford v. Chicago & N. W. Ry. Co.*, 14 Wis. 609; *Pomeroy v. Milwaukee & Chi. R. R. Co.*, 16 Wis. 640; *Hegar v. Chicago & N. W. Ry. Co.*, 26

owner has title to the center of the street only, and the railroad is laid wholly on the half of the street beyond his

Wis. 624; *Sherman v. Mil. Lake Shore & Western R. R. Co.*, 40 Wis. 645; *Chapman v. Oshkosh & Miss. R. R. Co.*, 33 Wis. 629; *Carl v. Sheboygan & Fond du Lac. R. R. Co.*, 46 Wis. 625; *Blesch v. C. & N. W. Ry. Co.*, 48 Wis. 168; *Buckner v. Chi. Mil. & N. W. Ry. Co.*, 56 Wis. 403; *Hanlin v. Chicago & N. W. Ry. Co.*, 61 Wis. 515; *Alabama G. S. R. R. Co. v. Collier*, 112 Ala. 681; *Western R. R. Co. v. Ala. G. S. R. R. Co.*, 96 Ala. 272, 11 So. Rep. 483; *Reichert v. St. Louis etc. R. R. Co.*, 51 Ark. 491; *Strickler v. Midland R. R. Co.*, 125 Ind. 412, 25 N. E. Rep. 455; *Porter v. Midland R. R. Co.*, 125 Ind. 476, 25 N. E. Rep. 556, 3 Am. R. R. & Corp. Rep. 357; *Witt v. St. Paul etc. R. R. Co.*, 38 Minn. 122, 35 N. W. Rep. 862; *Papooshek v. Winona etc. R. R. Co.*, 44 Minn. 195, 46 N. W. Rep. 329; *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279, 6 So. Rep. 230; *Central R. R. Co. v. Hatfield*, 18 N. J. Eq. 323; *Clark v. Brooklyn City R. R. Co.*, 30 Hun 409; *Syracuse Solar Salt Co. v. Rome etc. R. R. Co.*, 67 Hun 153, 22 N. Y. Supp. 321; *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; *Lawrence R. R. Co. v. O'Harra* 48 Ohio St. 343, 28 N. E. Rep. 175; *Harmon v. Louisville etc. R. R. Co.*, 87 Tenn. 614, 11 S. W. Rep. 703; *Hodges v. Seaboard etc. R. Co.*, 88 Va. 653, 14 S. E. Rep. 380; *Trustees v. Milwaukee etc.*

*R. R. Co.*, 77 Wis. 158, 45 N. W. Rep. 1086; *Taylor v. Chicago etc. R. R. Co.*, 83 Wis. 636, 53 N. W. Rep. 853; *Evans v. Chicago etc. R. R. Co.*, 86 Wis. 397, 57 N. W. Rep. 357; *Frey v. Duluth etc. R. R. Co.*, 91 Wis. 309, 64 N. W. Rep. 1038; *Bond v. Pennsylvania R. R. Co.*, 171 Ill. 508; *Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 95 Wis. 561. To the contrary are the following cases: *Harrison v. New Orleans, Pacific R. R. Co.*, 34 La. An. 462; *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. St. 340; *Phila. & Trenton R. R. Co.*, 6 Whart. 25; *McLaughlin v. Railroad Co.*, 5 Rich. S. C. 583; *Perry v. New Orleans M. & C. R. R. Co.*, 55 Ala. 413; *Mobile etc. R. R. Co. v. Alabama Midland R. R. Co.*, 116 Ala. 51, 23 So. Rep. 57; *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786; *Neitsey v. Baltimore & O. R. R. Co.*, 5 Mackey, 34; *Glick v. Baltimore & O. R. R. Co.*, 19 D. C. 412; *Fulton v. Short Route R. R. Tram. Co.*, 85 Ky. 640, 4 S. W. Rep. 332; *Wenger v. St. Louis etc. R. R. Co.*, 35 La. An. 641; *Hepting v. New Orleans, Pac. R. R. Co.*, 36 La. An. 898; *Tate v. M. K. & T. R. R. Co.*, 64 Mo. 149; *Corey v. Buffalo etc. R. R. Co.*, 23 Barb. 482; *Appeal of Philadelphia etc. R. R. Co.*, 2 Walker's Pa. Supm. Ct. Rep. 291; *Yates v. Town of West Grafton*, 34 W. Va. 783, 12 S. E. Rep. 1075; *Hoffman v. Flint etc. R. R. Co.*, 114 Mich. 316, 72 N. W. Rep. 167; *Coatsworth v. Lehigh Val. R. R. Co.*, 156 N.

line, his right to compensation would be controlled by the same principles as where the fee of the whole is in the public, which is discussed in the following sections.<sup>84</sup> Where a railroad is laid upon a turnpike, the owner of the fee may have compensation for the additional burden.<sup>85</sup> Where a railroad company is authorized to appropriate a highway and lay out a new one to accommodate the public, the appropriation of the highway amounts to a vacation of it, the title reverts to the owner, and he is entitled to compensation as if no highway existed.<sup>86</sup>

§ 114. **Rights of abutting owners where fee of street in the public.**—The subject matter of this section as given in the first edition has been transferred to sections 91e and 91f.

§ 115. **Right to compensation where fee of street in the public.**—It having been determined that, though the fee of a street is in the public, the abutting owner has certain private rights therein, appurtenant to his property,<sup>1</sup> it follows that, when those rights are interfered with under the power of eminent domain, there has been a taking within the constitution.<sup>2</sup> The existence and operation of a commercial railroad in the street is necessarily some interference with those rights, and, to the extent of such interfer-

Y. 451; *Ray v. New York Bay Extension R. R. Co.*, 34 App. Div. N. Y. 3.

<sup>84</sup> "If the road is laid wholly on the other half of the street, the abutter's right to compensation would be the same as in cases where the fee of the entire street is in the public." *Stewart v. Ohio Riv. R. R. Co.* 38 W. Va. 438, 18 S. E. Rep. 604. See *Terre Haute & Logansport R. R. Co. v. Bissell*, 108 Ind. 113; *Heiss v. Milwaukee & Lake Winnebago R. R. Co.*, 69 Wis. 555; *Kuhl v. Chicago & N. W. R. R. Co.*, 101 Wis. 42; *Trustees v. Milwaukee etc. R. R. Co.*, 77

Wis. 158, 45 N. W. Rep. 1086; *Beck v. Erie Terminal R. R. Co.*, 11 Pa. Co. Ct. 363; *Alabama G. S. R. R. Co. v. Collier*, 112 Ala. 681.

<sup>85</sup> *Mahon v. Utica & Schenectady R. R. Co.*, Supl. to Hill & Denio, 156; *Mifflin v. Railroad Co.*, 16 Pa. St. 182. In the latter case the turnpike was vested in the railroad company by act of the legislature.

<sup>86</sup> *Phillips v. Dunkirk, Warren & Pittsburgh R. R. Co.*, 78 Pa. St. 177.

<sup>1</sup> Ante §§ 91e-91f.

<sup>2</sup> Ante § 56.

ence, a right to compensation exists.<sup>3</sup> For any physical injury to the abutting property, as by casting cinders upon it, polluting the air with smoke and gases, or by vibrations communicated through the soil to an extent which would be actionable if the property was not a street, a recovery may be had.<sup>4</sup> With respect to this class of injuries the abutting owner's rights are the same as though the street was private property, and these rights are discussed elsewhere.<sup>5</sup> The tendency of the later decisions is towards the protection of private rights and the more accurate ascertainment and definition of those rights. It is now well settled by the great weight of authority that, where the fee of a street is in the abutting owner, he may recover for the additional burden caused by a commercial railroad laid on the street. These cases necessarily proceed upon the basis that a commercial railroad is not a legitimate street use. The cases which deny compensation in any case, on the ground that such a railroad is a legitimate use of a highway, are so clearly against good sense and reason that we do not think they require further discussion. The right to

<sup>3</sup> *Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290; *South Carolina Railroad Co. v. Steiner*, 44 Ga. 546; *C. B. U. P. R. R. Co. v. Twine*, 23 Kan. 585; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382; *J. M. & I. R. R. Co. v. Esterle*, 13 Bush, Ky. 667; *Schurmeler v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82; *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; *G. C. & S. F. R. R. Co. v. Eddins*, 29 Alb. L. J. June 1884, 518; *Western R. R. Co. v. Ala. G. T. R. R. Co.*, 96 Ala. 272, 11 So. Rep. 483; *Ft. Scott W. & W. R. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. Rep. 583; *Adams v. C. B. & Q. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629; *Theobald v. Louisville etc. R. R. Co.*, 66 Miss.

279, 6 So. Rep. 230; *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 438, 18 S. E. Rep. 604.

<sup>4</sup> *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Atchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 552; *Crosby v. Owensboro etc. R. R. Co.*, 10 Bush, 288; *Elizabethtown R. R. Co. v. Combs*, 10 Bush, 382; *J. M. & I. R. R. Co. v. Esterle*, 13 Bush, 667; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Parrott v. Cincinnati etc. R. R. Co.*, 3 Ohio St. 330; *Same v. Same*, 10 Ohio St. 624; *G. C. & S. F. R. R. Co. v. Eddins*, 29 Alb. L. J. 518.

<sup>5</sup> See Post, § 152.

recover where the fee is in the public is involved in so much doubt by the authorities that we have collected in a note all the cases which involve the question, with such comment as seems appropriate.<sup>6</sup> We have allowed this to stand as it was written in the first edition. Since then it has become very firmly established that the abutter, though he has not the fee of the street, has certain private rights of access, light and air, which are as much property as the lot itself; also that any interference with such rights by a use which is not within the legitimate purposes of a highway, is a taking within the constitution.

§ 115a. Right to compensation where fee of street in third party.—It sometimes happens that the fee of a street is in neither the abutting owner or the public, but in a

<sup>6</sup> Alabama. No recovery, whether fee in owner or public. *Parry v. New Orleans M. & C. R. R. Co.*, 55 Ala. 413. This case is overruled by *Western R. R. Co. v. Alabama G. T. R. R. Co.*, 96 Ala. 272, 11 So. Rep. 433; *Alabama G. S. R. R. Co. v. Collier*, 112 Ala. 681; *Mobile etc. R. R. Co. v. Ala. Midland R. R. Co.*, 116 Ala. 51, 23 So. Rep. 57.

California. Fee in public, no compensation. *Carson v. Central R. R. Co.*, 35 Cal. 325. Overruled by later cases. *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Schulte v. North Pacific Transportation Co.*, 50 Cal. 592; *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290. But no recovery can be had unless actual damages are sustained. *Hogan v. Central Pacific R. R. Co.*, 71 Cal. 83. The late case of *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25, again holds that a railroad for freight and passengers is a legitimate street

use, but holds also that the abutter is entitled to damages, whether or not he may be vested with the fee to the center of the street if his right of ingress and egress or his right to light and air are interfered with. See *Constitution of California*, ante § 17.

Colorado. In favor of recovery. *Denver v. Bayer*, 7 Col. 113; *Denver etc. R. R. Co. v. Damke*, 11 Col. 247.

District of Columbia. Against recovery whether fee in the abutter or in the public. *Nottingham v. B. & P. R. R. Co.*, 3 McArthur, 517; *Neitsey v. Baltimore & O. R. R. Co.*, 5 Mackey, 34; *Glick v. Baltimore & O. R. R. Co.*, 19 D. C. 412.

Florida. See *Florida Southern R. R. Co. v. Brown*, 23 Fla. 104.

Georgia. Earlier cases against recovery. *Savannah, A. & G. R. R. Co. v. Shields*, 33 Ga. 601; *Roll v. City Council of Augusta*, 34 Ga. 326; Overruled in *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546, 560. In this case the

court say: "The owners of lands and tenements on Washington street are entitled to have and enjoy all the rights and privileges which legally appertain thereto, incorporeal as well as corporeal; for when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same. If the railroad companies, by permission of the public authorities, have located their road on the public street of the city, and by the use thereof, in running their trains, have invaded any of the legal rights of the owners of the lands and tenements on the street by hindering, obstructing or disturbing them in the regular use and lawful enjoyment of the same, then the owners of such lands and tenements are entitled to recover such damages as they have actually sustained by such invasion of their legal rights to the enjoyment of their property, although the railroad companies may not have located their road on any part of it. The invading, hindering, obstructing or disturbing them in the regular use and lawful enjoyment of their property is an interference with their private legal rights to that property, and, to that extent, is the taking of private property for public use, for which just compensation should be made."

**Illinois.** Fee in public, no compensation, on the ground that a railroad is a legitimate use. *Moses v. Pittsburgh, Ft. W. & C. R. R. Co.*, 21 Ill. 516. The ground of this case overruled in *Indianapolis etc. R. R. Co. v. Hartley*,

67 Ill. 439; see also *C. B. & Q. R. R. Co. v. McGinnis*, 79 Ill. 269. The right to recover is now settled by the constitution; ante § 23.

**Indiana.** *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Hutton v. Indiana Cent. R. R. Co.*, 7 Ind. 522; *Protzman v. Indianapolis & Cin. R. R. Co.*, 9 Ind. 467; *Indiana Cent. R. R. Co. v. Broden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Dally*, 12 Ind. 551; *Same v. Same*, 13 Ind. 353; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Dwenger v. Chicago & Grand Trunk R. R. Co.*, 98 Ind. 153. These cases leave the question in doubt where the fee is in the public and the railroad is laid on the surface of the street. In *Decker v. Evansville Suburban R. R. Co.*, 133 Ind. 493, 33 N. E. Rep. 349, it is held that an abutter, though he has not the fee is entitled to compensation if his access is materially interfered with. And see *Pittsburgh & C. R. Co. v. Noftsger*, 148 Ind. 101.

**Iowa.** Rule of no compensation where fee in public is firmly upheld. *Milburn v. Cedar Rapids*, 12 Ia. 246; *Hughes v. Miss. & Mo. R. R. Co.*, 12 Ia. 261; *Clinton v. Cedar Rapids etc. R. R. Co.*, 24 Ia. 455; *Slatten v. Des Moines Valley R. R. Co.*, 29 Ia. 148; *Davenport v. Stevenson*, 34 Ia. 225; *Ingraham v. C. D. & M. R. R. Co.*, 34 Ia. 249; *Ingram v. Same*, 38 Ia. 669; *Chicago etc. R. R. Co. v. Newton*, 36 Ia. 299; *Hine v. K. & D. M. R. R. Co.*, 42 Ia. 636; *Cadle v. Muscatine Western R. R. Co.*, 44 Ia. 11; *Frith v. Dubuque*, 45 Ia. 406; *Davis v. C.*



& N. W. Ry. Co., 46 Ia. 389; *Simplot v. Chicago, M. & St. Paul Ry. Co.*, 5 McCrary, 153. The ground taken, in some of the cases, that a railroad is a legitimate use of a street, is overruled in *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 386. But the later case of *O'Connor v. St. Louis etc. R. R. Co.*, 56 Ia. 735 affirms the doctrine of no compensation, when the fee is in the public. Compensation is now required by statute. § 219, post.

Kansas. No recovery, fee in public. *Atchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 552. This case is virtually, though not expressly, overruled in the later cases of *C. B. U. P. R. R. Co. v. Twine*, 23 Kan. 585; *Same v. Andrews*, 26 Kan. 702; *Central Branch Union Pacific R. R. Co. v. Andrews*, 30 Kan. 590. This last case has been several times in the Supreme Court since the first edition and is reported as follows: 34 Kan. 565; 37 Kan. 162; 37 Kan. 641; 41 Kan. 370, 21 Pac. Rep. 276. In *Kansas, N. & D. R. R. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051, the rule to be deduced from recent decisions of the court is stated to be that, "In order to justify a recovery for damages by the abutting lot-owner, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress and egress to and from them. While the title to the streets is in the county, the legislature has given to the city government the power of full control. The abutting lot-owner has no greater right to the use of the public

street than a railroad company that has been authorized to construct its line along it. Each must respect the use of the other, but nothing short of a practical obstruction of the use by one will be a cause of action to the other. A railroad is not an unreasonable obstruction to the free use of the street, but rather a new and improved method of using the same, and germane to its principal object as a passageway, like the electric, steam-motor and horse-car lines. So that, if the location and construction of the line of railroad is authorized by the city council, and its location in the street is such as to give the lot-owner ingress and egress to and from his lots, such use of the street by the railroad company does not interfere with the use of the lot-owner, and consequently he cannot recover for those remote and indirect inconveniences 'arising from smoke, noise, offensive vapors, sparks, fires, shaking of the ground,' and other annoyances." See *Ottawa etc. R. R. Co. v. Larson*, 40 Kan. 301, 19 Pac. Rep. 661; *Kansas, K. & N. R. R. Co. v. McAfee*, 42 Kan. 239, 21 Pac. Rep. 1052; *Ft. Scott, W. & W. R. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. Rep. 583; *Wichita etc. R. R. Co. v. Smith*, 45 Kan. 264, 25 Pac. Rep. 623; *Kansas, N. & D. R. R. Co. v. Mahler*, 45 Kan. 565, 26 Pac. Rep. 22; *Herndon v. Kansas, N. & D. R. R. Co.*, 46 Kan. 560, 26 Pac. Rep. 959; *Leavenworth etc. R. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. Rep. 297; *Chicago etc. R. R. Co. v. Union Inv. Co.*, 51 Kan.

600, 33 Pac. Rep. 378; Ottawa etc. R. R. Co. v. Peterson, 51 Kan. 604, 33 Pac. Rep. 606; Atchison etc. R. R. Co. v. Luening, 52 Kan. 732, 35 Pac. Rep. 801; Atchison etc. R. R. Co. v. Arnold, 52 Kan. 729, 35 Pac. Rep. 780; Atchison etc. R. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. Rep. 787.

Kentucky. The general doctrine is that the abutting owner cannot recover, whether fee in the public or otherwise. Lexington & Ohio R. R. Co. v. Applegate, 8 Dana, (Ky.) 289; Wolf v. Covington & Lexington R. R. Co., 15 B. Mon. 404; Louisville & Frankfort R. R. Co. v. Brown, 17 B. Mon. 763; Cosby v. Owensboro & Russellville R. R. Co., 10 Bush, (Ky.) 288; Elizabethtown & Paducah R. R. Co. v. Thompson, 79 Ky. 52. But the abutting owner's right to use the street is recognized as property, and any unreasonable use of the street by a railroad is actionable. Elizabethtown etc. R. R. Co. v. Combs, 10 Bush, 382; J. M. & I. R. R. Co. v. Esterle, 13 Bush 667; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. Rep. 332; Louisville & N. R. R. Co. v. Orr, 91 Ky. 109, 15 S. W. Rep. 8; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. Rep. 287; Strickley v. Chesapeake & O. R. R. Co., 93 Ky. 323, 20 S. W. Rep. 261; Henderson Belt R. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. Rep. 605; Chesapeake & O. R. R. Co. v. Kobs, (Ky.) 80 S. W. Rep. 6; Maysville & B. S. R. R. Co. v. Ingram, (Ky.) 30 S. W. Rep. 8; Dulaney v. Louisville etc. R. R.

Co., 100 Ky. 628. Exactly at what point the use becomes unreasonable and what rule is to be applied in determining what is an unreasonable use the cases do not inform us. But, when it is conceded that the abutting owners have a private right to use the street, we think a right to recover follows in every case of a disturbance of that right.

Louisiana. No right to compensation in any case. New Orleans, M. & C. R. R. Co., 26 La. An. 517; Koehmel v. Same, 27 La. An. 442; Harrison v. New Orleans Pacific R. R. Co., 34 La. An. 462; Hill v. Chicago, St. Louis & New Orleans R. R. Co., 38 La. An. 599. But an unreasonable location in a street so as to take part of plaintiff's awning was restrained in Laviosa v. Chi. St. L. & N. O. R. R. Co., 1 McGlain, La. 299. A right to compensation is now assured by the constitution. Ante § 28, see: Heptling v. New Orleans Pac. R. R. Co., 36 La. An. 898.

Michigan. Right to recover when fee in public not directly passed upon; but see Grand Rapids etc. R. R. Co. v. Heisel, 38 Mich. 62; Same v. Same, 47 Mich. 393. Abutter may recover when he owns the fee. Hoffman v. Flint etc. R. R. Co., 114 Mich. 316, 72 N. W. Rep. 167.

Minnesota. Abutting owner may have compensation, though fee in the public. Schurmeir v. St. Paul & Pacific R. R. Co., 10 Minn. 82, 105; Cash v. Union Depot etc. Co., 32 Minn. 101; Adams v. C. B. & Q. R. R. Co., 39 Minn. 286, 39 N. W. Rep. 629; Lamm v. Chicago etc. R. R. Co.,

45 Minn. 71, 47 N. W. Rep. 455.

Mississippi. See *Donnaker v. State of Mississippi*, 8 S. & M. 649; *New Orleans, J. & G. N. R. R. Co. v. Moye*, 39 Miss. 374. Neither of these cases passes directly upon the right to compensation when the fee is in the abutting owner. In the recent case of *Theobald v. Louisville N. O. & T. R. R. Co.*, 66 Miss. 279, 6 So. Rep. 230, it is held that the abutting owner is entitled to compensation whether he owns the fee or not, and the positions taken in this chapter as to the rights of abutting owners are fully approved.

Missouri. In this State no distinction appears to have been based upon the ownership of the fee. No damages can be recovered for a railroad on the surface of a street, if built and operated in a proper manner. *Lackland v. North Mo. R. R. Co.*, 31 Mo. 180; *Same v. Same*, 34 Mo. 259; *Tate v. M. K. & T. R. R. Co.*, 64 Mo. 149; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Swenson v. Lexington*, 69 Mo. 157; *Botto v. Mo. Pacific R. R. Co.*, 11 Mo. App. 589; *Cross v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 318; *Henry Gauss & Sons Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 20 S. W. Rep. 658, 7 Am. R. R. & Corp. Rep. 235. In the last case the court goes so far as to hold that a commercial railroad laid at the surface of a street is not only not a taking of the property of abutting owners, but not even a damaging of their property within the meaning of a constitution requiring compensation for prop-

erty damaged as well as taken. See post, § 225. But where the railroad is laid on an embankment, or upon or close to the sidewalk, or in a narrow street, so as practically to destroy it as a thoroughfare, it is held the abutter may have a remedy, either for damages or an injunction. *Smith v. Kansas City etc. R. R. Co.*, 98 Mo. 20, 11 S. W. Rep. 259; *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86, 26 S. W. Rep. 698; *Knapp, Stout & Co. v. St. Louis Transfer R. R. Co.*, 126 Mo. 26, 28 S. W. Rep. 626; *Schulenburg etc. Co. v. St. Louis etc. R. R. Co.*, 129 Mo. 455, 31 S. W. Rep. 796. In the late case of *Sherlock v. Kansas City etc. R. R. Co.*, 242 Mo. 172, the court says: "While this court, by a long line of decisions from *Lackland v. R. R.*, 31 Mo. 180, down to and including *Gaus & Sons v. R. R.*, 113 Mo. 308, has held that 'the laying of a railroad track on the established grade and operating a steam railroad thereon, does not subject the street to a servitude different from that which was contemplated in the original dedication,' it has been seriously questioned, and it may be gravely doubted whether the weight of modern authority in this country is not rightly arrayed against such a doctrine."

Nebraska. The abutting owner may recover, though the fee is in the public. *Burlington & Missouri Riv. R. R. Co. v. Reinhackle*, 15 Neb. 279; *Chicago etc. R. R. Co. v. Sturey*, 55 Neb. 137, 75 N. W. Rep. 557.

New Jersey. *Morris & Essex*

R. R. Co. v. Newark, 10 N. J. Eq. 352; H. B. Anthony Shoe Co. v. West Jersey R. R. Co., 57 N. J. Eq. 607.

New Mexico. See New Mexican R. R. Co. v. Hendricks, (N. M.) 30 Pac. Rép. 901.

New York. The right to compensation, when the fee is in the public, would seem to be settled by the elevated railroad cases. Story v. New York Elevated R. R. Co., 90 N. Y. 122; Mahady v. Brunswick R. R. Co., 91 N. Y. 148; Matter of East River Bridge etc., 26 Hun 490. This prediction, made in the first edition, has not been fulfilled, but the court of appeals, while adhering fully to the doctrine enunciated in the elevated railroad cases, above cited, has reaffirmed the earlier doctrine, that an abutting owner, not having the fee of the street, cannot recover for a commercial railroad laid on the surface or legal grade of the street. Fobes v. Rome, W. & O. R. R. Co., 121 N. Y. 505, 24 N. E. Rep. 919, 3 Am. R. R. & Corp. Rep. 182; Case v. Cayuga County, 34 N. Y. Supp. 595. In the Fobes case it is intimated that there might be a remedy for an excessive use of the street. But if access is interfered with by an embankment, made for the accommodation of the railroad and not in good faith as a change of grade, then the abutter may recover for such interference. Reining v. New York etc. R. R. Co., 128 N. Y. 157, 28 N. E. Rep. 640, 5 Am. R. R. & Corp. Rep. 476; Egerer v. New York Central etc. R. R. Co., 130 N. Y. 108, 29 N. E. Rep.

95, 5 Am. R. R. & Corp. Rep. 241; Coatsworth v. Lehigh Valley R. R. Co., 156 N. Y. 451. Compare Rauenstein v. New York etc. R. R. Co., 136 N. Y. 528, 32 N. E. Rep. 1047, 7 Am. R. R. & Corp. Rep. 520.

Nevada. Virginia & T. R. R. Co. v. Lynch, 13 Nev. 92.

North Carolina. White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103, repudiates the distinctions based upon the ownership of the fee of the street and holds that the abutter may recover whether he has the fee or not.

Ohio. Parrott v. Cincinnati etc. R. R. Co., 3 Ohio St. 330; S. C. 10 Ohio St. 624; Railroad Co. v. Hambleton, 40 Ohio St. 496.

Pennsylvania. Right to compensation denied in all cases. Phila. & Trenton R. R. Co., 6 Wharton, 25; Mercer v. Pittsburgh, Ft. W. & C. R. R. Co., 36 Pa. St. 99; Snyder v. Pennsylvania R. R. Co., 55 Pa. St. 340; Cleveland etc. R. R. Co. v. Speer, 56 Pa. St. 325; Black v. Phila. & R. R. R. Co., 58 Pa. St. 249; Danville, H. & W. R. R. Co. v. Commonwealth, 73 Pa. St. 29; Struthers v. Dunkirk etc. Ry. Co., 87 Pa. St. 282. In the latter case the court was urged to overrule former decisions, but refused to do so. See also Philadelphia v. Empire Passenger R. R. Co., 3 Brews. 547; Faust v. Passenger Railway Co., 3 Phila. 164. Compensation is now secured by the constitution of 1873. In Kane v. New York El. R. R. Co., 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744,

third party.<sup>7</sup> In such case the rights of the abutting owner, as against the public, are the same as though the public had the fee, and the rights of the public are the same as though the fee was in the abutting owner. The right to

750, it is said by Andrews J., delivering the opinion of the court, and referring to the Pennsylvania courts: "The courts of that State have strenuously asserted the supreme power of the legislature to appropriate streets to public uses destructive of their ordinary use as public ways, and have denied the right of abutting owners to compensation, however serious the injury to their property occasioned by such appropriation. The injustice of this rule led to the insertion in the new constitution of Pennsylvania, adopted in 1874, of a provision declaring that municipal and other corporations, invested with the privilege of taking private property for public use, should make compensation for property 'taken, injured or destroyed,' by the construction of their works, etc."

South Carolina. Recovery denied without regard to fee: *McLaughlin v. Railroad Co.*, 5 Rich. (S. C.) 583. But see *Wilkins v. Gaffney City*, 54 S. C. 199, 32 S. E. Rep. 299.

Tennessee. When fee in the public there can be no recovery unless the abutter's right of access is unreasonably interfered with. *Iron Mt. R. R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. Rep. 705.

Texas. Fee in the public, no compensation. *H. & T. C. R. R.*

*Co. v. Odum*, 53 Tex. 343; overruled in *G. C. & S. F. R. R. Co. v. Eddins*, 29 Alb. L. J. 518. The right to recover is now settled by the constitution. Ante § 48; *Morrow v. St. Louis etc. R. R. Co.*, 81 Tex. 405, 17 S. W. Rep. 44.

Vermont. *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49; *S. C.* 28 Vt. 142; *Richardson v. Same*, 25 Vt. 465.

Washington. The constitution gives compensation for property taken or damaged. See *Hatch v. Tacoma etc. R. R. Co.*, 6 Wash. 1, 32 Pac. Rep. 1063; *Kaufman v. Tacoma etc. R. R. Co.*, 11 Wash. 632, 40 Pac. Rep. 137.

West Virginia. The propriety of distinctions based upon the ownership of the fee is much discussed in *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406, 426-432, but the case is decided on other grounds. It is now settled that, under the constitution of 1872, the abutter may recover to the extent his property is depreciated by the construction and operation of the railroad, whether he owns the fee or not. *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 433, 18 S. E. Rep. 604; *Arbenz v. Wheeling & H. R. R. Co.*, 33 W. Va. 1, 10 S. E. Rep. 14.

<sup>7</sup> *Decker v. Evansville Suburban & R. R. Co.*, 133 Ind. 493, 33 N. E. Rep. 349.

compensation would be the same as in cases where the public has the fee, and is treated in the last section.

§ 115b (123). **Elevated railroads.**—The principles which apply to elevated railroads do not differ from those which apply to surface roads. They are clearly not within the ordinary and legitimate uses for which highways are established. If the fee of the street is in the abutting owner, he is entitled to compensation, as in case of the ordinary steam railroad.<sup>8</sup> If the fee is not in the abutting owner, he is still entitled to recover for damages occasioned to his property by interfering with his right of access and his right to light and air. These rights are property, and, to impair or destroy them is a taking.<sup>9</sup> Various questions in reference to the elevated railways of New York City came before the courts of New York prior to 1882,<sup>10</sup> but the right to compensation was not authoritatively passed upon until the decision made by the Court of Appeals in *Story v. New York Elevated Railroad Co.*<sup>11</sup> Plaintiff owned an improved lot abutting on Front street, in which the defendant proposed to construct "a road upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside the edge of the sidewalk, and carrying girders, from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails

<sup>8</sup> Ante § 113.

<sup>9</sup> Ante § 56.

<sup>10</sup> *Matter of New York Elevated R. R. Co.*, 70 N. Y. 327; *Matter of Gilbert Elevated Ry. Co.*, 70 N. Y. 361; *Matter of Kings County Elevated Ry. Co.*, 82 N. Y. 95; *Sixth Ave. Ry. Co. v. Gilbert Elevated Ry.*, 43 N. Y. Supr. Ct. 292; S. C. 41; N. Y. Sup. Ct. 489; *Matter of East River Bridge & Rapid Transit Co.*, 10 Abb. New Cases, 245; *Matter of East River Bridge etc. Co.*, 26 Hun 490; *Matter of Brooklyn Rapid Transit Co.*, 62 How. Pr. 404. A collection of

Elevated Railway cases with a note will be found in Vol. 3, Abbott's New Cases, as follows: *Patten v. New York Elevated R. R. Co.*, p. 306; *Ninth Ave. R. R. Co. v. Same*, p. 347; *Sixth Ave. R. R. v. Gilbert Elevated R. R. Co.*, p. 372; *Matter of New York Elevated R. R. Co.*, p. 401; *Gilbert Elevated R. R. Co. v. Anderson*, p. 434; *Spader v. New York Elevated R. R. Co.*, p. 467; *Story v. Same*, p. 478.

<sup>11</sup> 90 N. Y. 122, decided Oct. 17th, 1882, found also in 11 Abb. New Cases, p. 236.

for a steam railroad." The cars intended for the road, when placed thereon, would extend eleven feet above the tracks, would project two feet over the sidewalk on either side of the street and reach within nine feet of plaintiff's buildings. It was found as matter of fact that the existence of this structure and operation of the road would interfere with access to the plaintiff's premises, and would, to some extent, intercept the light and air from his building and impair the enjoyment and value of his property. The lot and street in question were originally a part of a tract of land platted and sold by the city of New York, and in the deeds from the city it is declared that "the said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the said city now are or lawfully ought to be." Front street was one of the streets referred to. Plaintiff's lot was originally conveyed as bounded on Front street, and whatever rights in the street had attached to the lot originally were duly vested in the plaintiff. The case was principally considered on the theory that the fee of the street was in the city. It was held that the original purchaser acquired certain rights in the street, in the nature of an easement therein appurtenant to his lot. "But what is the extent of this easement?" says the court. (p. 146). "What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This in effect was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street.

In this case it is found by the trial court in substance, that the structure proposed by the defendant, and intended for the street opposite the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse and thus work his injury. In doing this thing the defendant will take his property as much as if it took the tenement itself."<sup>12</sup>

Although, in this particular case, the street in question was laid out by the city itself, which also originally granted the plaintiff's lot with a covenant that the street should forever remain open as a public street, yet the principles of the decision will apply with equal force to property abutting

<sup>12</sup> The conclusions of the court upon the whole case are given by Tracy, J., as follows:

"First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front street, which enables him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the constitution, of which he cannot be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front street, and which it has since erected, is inconsistent with the use of Front street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for

public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. The injunction prohibiting the continuance of the road in Front street, should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same." pp. 178, 179. The decision of the court is by Andrews, Ch. J., Rapallo, Danforth, and Tracy, JJ. Miller, Earl and Finch, JJ., dissent.



upon streets established by private dedication or by condemnation. In platting and conveying the property the city acted merely as a private party. The deeds of conveyance executed by the city did not expressly transfer any rights in the streets as appurtenant to the abutting property, nor define how the streets were to be used and enjoyed, except in general terms which would have been implied by law. The meaning of the covenant in the deed, that the streets in question are to be kept open, as public streets; "in like manner as the other streets of the said city now are or lawfully ought to be," is to be determined by reference to the general law and custom which regulates the uses of streets in cities. The court does not determine whether an elevated railroad is a legitimate use of Front street by reference to the deed of the city, but by reference to the manner in which the streets of a city have been immemorially used and enjoyed. Had the property in question been platted and sold by a private individual, the purchasers would have acquired the same rights in Front street as the grantees of the city acquired. And so, had the streets in question been established by condemnation, the result to the abutting property would have been the same.<sup>13</sup> In short, the right to light, air and access over a public street is a universal and inseparable constituent of abutting property. Such right is property, as sacred as the lot itself, and cannot be interfered with or taken for public use without compensation.<sup>14</sup>

These views in regard to the logical scope of the decision in the Story case are confirmed by the more recent case of *Lahr v. Metropolitan Elevated R. R. Co.*<sup>15</sup> In the latter case the Court of Appeals was strenuously urged to reconsider or modify its decision in the Story case, or at least confine its application to property held by grant from the city itself upon covenants similar to those in question in the Story case. But the court refused to do either, and expressly approved of its former decision and declared that,

<sup>13</sup> Ante §§ 91e-91h.

Cases, 276; *Glover v. Manhattan Ry. Co.*, 66 How. Pr. 77.

<sup>14</sup> *Peyser v. New York Elevated R. R. Co.*, 12 Abb. New

<sup>15</sup> 104 N. Y. 268.

"wherever the principles of that case logically lead us we feel constrained to go, and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages, as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses."<sup>16</sup>

Accordingly, in the case last referred to, the principles of the Story case were applied where the street was estab-

<sup>16</sup> "We hold that the Story case has definitely determined:

First. That an elevated railroad in the streets of a city, operated by steam power and constructed as to form equipments and dimensions like that described in the Story case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

Second. That abutters upon a public street, claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street is to be laid out in front of such property shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from

their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

Third. That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term, as used in the constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner, for public use.

Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damage occasioned by such taking." *Lahr v. Met. El. R. Co.*, 104 N. Y. 268, 288.

lished by condemnation and the fee acquired by the public for use as a highway. In another case it appeared that the street was established under an act which provided that the streets opened thereunder should be converted to the use of the public in the manner "now designated and settled by law, and in such other manner as the legislature may hereafter deem proper to enact. It was held, however, that the legislature could not enact that an elevated railroad should be operated in the street without compensation to the abutting owners."<sup>17</sup>

So far the first edition. Since 1888 the question has been decided in accordance with the earlier cases in numerous decisions of the New York courts and in respect to streets established under almost every conceivable variety of circumstances and conditions.<sup>18</sup> It is the settled law of that State that the abutting owner, irrespective of the ownership of the fee, and irrespective of the manner in which the street was established, has certain easements of light, air and access and is entitled to compensation when these are interfered with by an elevated railroad in the street.<sup>19</sup>

A system of elevated railroads has been established in

<sup>17</sup> *American Primitive Methodist Society v. Brooklyn El. R. Co.*, 46 Hun 530.

<sup>18</sup> In *Kane v. New York El. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744, the question arose, with reference to a street established under the Dutch regime and while the civil law was in force in the city, but the same conclusions were reached. See also *Hine v. New York El. R. R. Co.*, 54 Hun 425, 27 N. Y. St. 303, 7 N. Y. Supp. 464 and *Mortimer v. New York El. R. R. Co.*, 57 N. Y. Supr. Ct. 244, 6 N. Y. Supp. 898, where the same phase is elaborately discussed.

<sup>19</sup> The elevated railroad cases in New York are very numerous,

but most of them relate to other questions than the right to compensation and will be referred to in their appropriate connection. We cite the following as among the more important new cases, which deal with the rights of abutting owners and the right to compensation: *Newman v. Met. El. R. R. Co.*, 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318; *Abendroth v. Manhattan R. R. Co.*, 122 N. Y. 1, 25 N. E. Rep. 496, 3 Am. R. R. & Corp. Rep. 309, affirming S. C. 54 N. Y. Supr. Ct. 417; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278; *S. C. Sub. Nom. Duyckinck v. New York El. R. R. Co.*, 3 Am. R. R. & Corp. Rep. 744, affirming S. C. 15 Daly 294,

Chicago, partly upon streets and alleys and partly upon property acquired or condemned for that purpose. It has been held that they are a lawful use of the streets, but the court evidently intend by this that it is competent for the legislature to authorize their construction therein.<sup>20</sup> Compensation to abutting owners is guaranteed by the constitu-

6 N. Y. St. 526; *Williams v. Brooklyn El. R. R. Co.*, 126 N. Y. 96, 26 N. E. Rep. 1048; *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; *Messenger v. Manhattan R. R. Co.*, 129 N. Y. 502, 29 N. E. Rep. 955; *Bohm v. Metropolitan El. R. R. Co.*, 129 N. Y. 576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; *Hughes v. Met. El. R. R. Co.*, 130 N. Y. 14, 28 N. E. Rep. 765; *Bischoff v. New York El. R. R. Co.*, 138 N. Y. 257, 33 N. E. Rep. 1073. In a recent Maryland case the court, referring to the New York Elevated R. R. cases, says: "The New York doctrine involves this inextricable dilemma, viz.: If the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken, in the constitutional sense; but if a railroad company, in lawfully constructing its road, does precisely the same thing that the city did in grading the street, then the abutter's property is taken, though not physically entered upon at all." *Garrett v. Lake Roland El. R. R. Co.*, 79 Md. 277, 29 Atl. Rep. 830, 10 Am. R. R. & Corp. Rep. 39. But the court here ignores an important and controlling dis-

inction between grading a street and constructing an elevated railroad in it. The former is a legitimate use of the street for highway purposes, the latter is not. The abutter's rights of light, air and access, being subject to the right of the public to use and improve the street for highway purposes (ante, § 91e), he cannot complain of a change of grade, and nothing is taken from him thereby; but such rights not being subject to any but legitimate street uses, and an elevated railroad not being such a use, any interference with his easements by its construction and operation is so much taken from his property and he is entitled to compensation therefor under the constitution. Ante, § 56.

<sup>20</sup> *Doane v. Lake Street Elevated R. R. Co.*, 165 Ill. 510, 46 N. E. Rep. 520. The court says: "It is conceded that the common council of the City of Chicago is, by the provisions of our statute, given exclusive control and supervision of its streets, the fee of which is vested in the municipality. While they are held in trust for the public use and can only be appropriated to the purposes for which they were dedicated, it is the settled law of this State that permitting street railroads to be placed therein is not

tion, in the provision which requires compensation to be made for property damaged as well as for property taken, so that the question of whether such use of the streets constitutes a taking does not necessarily arise. In New Jersey compensation is required by statute and provision made for condemning in advance the rights of abutting owners.<sup>21</sup> A few miscellaneous cases bearing somewhat upon the subject of the section are referred to below.<sup>22</sup>

It seems to the writer that elevated street railroads may constitute a distinct class by themselves, as distinguished from surface street railroads of all kinds. The elevated structure creates a second street surface, a second story, so to speak, which seems utterly at variance with the original dedication of the street to public use as a highway. If such a structure and use is legitimate we might have one with two or three stories, each devoted to the same or different kind of traffic, or such a one as was contemplated in a recent New York case, consisting of a two-storied viaduct, sup-

subjecting them to an unlawful use. It has often been so decided by this court as to surface roads, and no good reason has been suggested, and none we think can be offered, for making a distinction in this regard between elevated and surface roads. The road in question, if constructed in conformity with the requirements of the ordinance, will certainly obstruct travel upon the street by other means less, and be less hazardous to the public, than would be a surface road. The pillars upon which the superstructure is to be built, which, it is claimed, will exclude the public from a part of the street, are but a necessary part of the road as much so as are the rails and other parts of tracks constructed upon the ground, or as are trolley

posts placed in the street for operating an electric road by the trolley system. It is true that all these things do to some extent interfere with the use of the street by ordinary vehicles, but the inconvenience is one which must be borne for the benefit resulting to the public from the better modes of travel thus afforded." And see *Metropolitan W. S. El. R. R. Co. v. Springer*, 171 Ill. 170.

<sup>21</sup> *Sullivan v. North Hudson County R. R. Co.*, 51 N. J. L. 518, 18 Atl. Rep. 689.

<sup>22</sup> *New York El. R. R. Co. v. Fifth Nat'l Bank*, 135 U. S. 432, 10 S. C. Rep. 743; *Fifth Nat'l Bank v. New York El. R. R. Co.*, 24 Fed. Rep. 114; *Hayes v. Waverly & P. R. R. Co.*, 51 N. J. Eq. 345, 27 Atl. Rep. 648; *Pennsylvania R. R. Co. v. Miller*, 132 U.

ported on brick arches, the first story fifty feet above the surface and the second seventy-five feet.<sup>23</sup>

The question of what constitutes an elevated railroad has been passed upon in Maryland.<sup>24</sup> The question was whether a certain structure, proposed to be built upon North avenue, in the city of Baltimore, was an elevated railroad within the meaning of a statute, which provided that no elevated railroad should be constructed in or through the city of Baltimore, except under a special charter of the general assembly. It was held that a street railroad built upon vertical iron pillars at an elevation of twenty feet above the street, and extending a distance of three quarters of a mile, was an elevated road, within the meaning of the statute, and the fact that the road was elevated only for the purpose of avoiding the tracks of a steam railroad on the surface of the street, and that a descent was made as soon as said tracks were out of the way, would not take the case out of the operation of the statute.

In Illinois it has been held that an elevated railroad may be constructed under the general railroad law of the State.<sup>25</sup> A different conclusion has been reached in Pennsylvania<sup>26</sup> and New York.<sup>27</sup>

S. 75, 10 S. C. Rep. 34, 1 Am. R. R. & Corp. Rep. 15; *Jones v. Railroad Co.*, 151 Pa. St. 30, 25 Atl. Rep. 134; *Fulton v. Short Route R. R. Trans. Co.*, 85 Ky. 640, 4 S. W. Rep. 332; *Freiday v. Sioux City Rapid Transit Co.*, 92 Ia. 191, 60 N. W. 656.

<sup>23</sup> *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. Rep. 25. The question involved was whether a corporation to construct such a railroad could be formed under the general incorporation law. It was decided in the negative. The railroad was not to be a street railroad but was to be used exclusively for passenger traffic.

<sup>24</sup> *Koch v. North Ave. R. R. Co.*, 75 Md. 222, 23 Atl. Rep. 463. See *Fulton v. Short Route R. R. Trans. Co.*, 85 Ky. 640, 4 S. W. Rep. 287.

<sup>25</sup> *Lieberman v. Chicago etc. R. R. Co.*, 141 Ill. 140, 30 N. E. Rep. 544.

<sup>26</sup> *Potts v. Quaker City El. R. Co.*, 161 Pa. St. 396, 29 Atl. Rep. 108; *Commonwealth v. Northeastern El. R. R. Co.*, 161 Pa. St. 409, 29 Atl. Rep. 112; *Potts v. Quaker City El. R. R. Co.*, 12 Pa. Co. Ct. 593.

<sup>27</sup> *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. Rep. 25; *Schafer v. Brooklyn &*

§ 115c (124). **Horse railroads.**—It has been determined in numerous decisions, and without dissent except in the State of New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner falls within the purposes for which streets are established and maintained, and consequently, that for any damages resulting from such use to the abutting owner, he can recover no compensation, whether the fee of the street is in him or in the public.<sup>28</sup> In New York State, after various decisions which left the matter in doubt,<sup>29</sup> it was finally held, in *Craig v. Rochester City & Brighton R. R. Co.*,<sup>30</sup> that a horse railroad was an additional burden upon the soil, for which

*L. I. R. R. Co.*, 124 N. Y. 630, 26 N. E. Rep. 311.

<sup>28</sup> *Carson v. Central R. R. Co.*, 35 Cal. 325; *Market Street Ry. Co. v. Central R. R. Co.*, 51 Cal. 583; *Elliott v. Fair Haven & Westville R. R. Co.*, 32 Conn. 579 (a nisi prius case only); *Savannah & Thunderbolt R. R. Co. v. Savannah*, 45 Ga. 602; *Elchels v. Evansville Street Ry. Co.*, 78 Ind. 261; *Clinton v. Clinton & Lyons Horse Railway Co.*, 37 Ia. 61; *Stange v. Hill & West Dubuque Street Ry. Co.*, 54 Ia. 669; *Stanley v. Davenport*, 54 Ia. 463; *Brown v. Duplessis*, 14 La. An. 842; *Briggs v. Lewiston & Auburn R. R. Co.*, 79 Me. 363; *Piddicord v. Baltimore etc. R. R. Co.*, 34 Md. 463; *Hiss v. Baltimore etc. Ry. Co.*, 52 Md. 242; *Hodges v. Baltimore Passenger Ry. Co.*, 53 Md. 603; *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515; *Hinchman v. Patterson H. R. R. Co.*, 17 N. J. Eq. 75; *Hogencamp v. Same*, 17 N. J. Eq. 83; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken H. R. R. Co.*, 20 N. J. Eq. 61; *Patterson etc. H. R. R.*

*Co. v. Patterson*, 24 N. J. Eq. 158; *West Jersey R. R. Co. v. Cape May etc. R. R. Co.*, 34 N. J. Eq. 164; *Street Railway v. Cummins-ville*, 14 Ohio St. 524; *Peterson v. Navy Yard etc. Ry. Co.*, 5 Phil. 199; *Texas & Pacific Ry. Co. v. Rosedale Ry. Co.*, 64 Tex. 80; *Hobart v. Milwaukee City Ry. Co.*, 27 Wis. 194; *Van Bokelen v. Brooklyn City Ry. Co.*, 5 Blatch. 379; *Randall v. Jacksonville St. R. R. Co.*, 19 Fla. 409; *State v. Jacksonville St. R. R. Co.*, 29 Fla. 590, 10 So. Rep. 590; *Van Horne v. Newark Pass. R. R. Co.*, 48 N. J. Eq. 332, 21 Atl. Rep. 1034.

<sup>29</sup> *Davis v. Mayor etc. of New York*, 14 N. Y. 506; *Milhau v. Sharp*, 15 Barb. 193; 27 N. Y. 611; *Wetmore v. Story*, 23 Barb. 414; *Mason v. Brooklyn City etc. R. R. Co.*, 35 Barb. 373; *People v. Law*, 34 Barb. 494; *People v. Kerr*, 37 Barb. 357; 27 N. Y. 188; 25 How. Pr. 258.

<sup>30</sup> *Craig v. Rochester City etc. R. R. Co.*, 39 Barb. 494; 39 N. Y. 404; see also *Thayer v. Rochester City etc. R. R. Co.*, 15 Abb. N. C. 52.

the abutting owner, having the fee, was entitled to compensation. In a later case it was determined that, where the fee of the street is in the public, the laying of a horse railroad on the surface of the street, under lawful authority from the municipality, was not a taking of any property of the abutting owner.<sup>31</sup>

§ 115d. **Cable railroads.**—Although the cable system of operating railroads has been in use for a long time, there seems to have been little question made as to the right to employ this system when authorized by the legislature. As the cable road leaves the street in substantially the same condition as the horse railroad and is operated in substantially the same manner, except as to motive power, it has doubtless been assumed that the same principles would apply to it. This assumption has been verified by a recent case in Pennsylvania which holds that a cable road is not an additional burden upon the soil, entitling the abutting owner to compensation. The reasoning of the court is, that street railways are legitimate highway uses and "whether the motive power of the cars be horses, electricity or a submerged cable makes no difference in the use, and no one of these modes of use confers any right of action upon the abutting owner."<sup>32</sup>

§ 115e. **Steam motor railroads.**—The question whether a street railroad, operated by means of a steam motor, is a legitimate street use, was first passed upon in Minnesota in 1886.<sup>33</sup> The plaintiff brought ejectment to recover pos-

<sup>31</sup> *Kellinger v. Forty-second Street etc. R. R. Co.*, 50 N. Y. 206; see also *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148.

<sup>32</sup> *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 23 Atl. Rep. 884; 6 Am. R. R. & Corp. Rep. 287. To the same effect is *Harrison v. Mt. Auburn Cable R. R. Co.*, 17 Weekly Bull. 265 (Hamilton Co. C. P. Ohio), referred to in *Keasby on Electric Wires*, p. 104, note 4. See, also, *Railroad*

*Co. v. Duncan*, 111 Penn. St. 352; *In re Third Ave. Ry. Co.*, 121 N. Y. 536, 24 N. E. Rep. 951; *People ex rel. Third Ave. Ry. Co. v. Newton*, 112 N. Y. 396; *Brady v. Kansas City Cable Ry. Co. (Mo.)*, 19 S. W. Rep. 953; *Indianapolis Cable St. R. R. Co. v. Citizens' St. R. R. Co.*, 127 Ind. 369; *Lorie v. North Chicago City R. R. Co.*, 32 Fed. Rep. 270.

<sup>33</sup> *Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112.



session of the street in front of his property as against the defendant which had occupied it with its railroad. The defendant's road extended from a point within the city of Minneapolis to Lake Minnetonka, eighteen miles beyond the city. The track consisted of T rails laid so as to conform to the surface of the street and placed so as to be readily crossed. The cars used were from thirty-four to thirty-seven feet long. The motors were about twenty feet long. The trains consisted of from one to four cars. Within the city it was operated like any ordinary street passenger railway so far as concerned speed and the taking up and letting down of passengers. Beyond the city it was operated like any ordinary steam railroad for general traffic. It was held to be a proper and legitimate use of the street as a highway, and a judgment for the defendant was affirmed. Mitchell, J., dissented on the ground that the road was a new and different use of the street from that contemplated when it was acquired. The opinion of the court proceeds on the basis that a horse railway is a legitimate street use, and that the road in question is not substantially different; that the surface of the street was not essentially disturbed; that it did not appear to seriously interfere with the ordinary use of the street and was an aid to the traffic thereon. The same doctrine is held in Maine.<sup>34</sup> In Tennessee a steam dummy street railroad was held to be an additional servitude upon the fee of the street, and a use different from and inconsistent with the ordinary use of a highway.

<sup>34</sup> *Briggs v. Lewiston & Auburn R. R. Co.*, 79 Me. 363, 1887. The court held that whether operated by horse or steam power the use was legitimate. As to the motor, it says: "We do not think the motor is the criterion. It is rather the use of the street. If the railroad company exclusively occupy the land—shut off the street from it, deprive it of its character of bearing the easement of a street—use it, not for street traffic, but for what is

known as railroad traffic, the company may, perhaps, be said to make a new and different use of the land. But we have no occasion now to express any opinion on that question. This defendant company is using the land as a street. Its railroad is a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use."

The reasons for this conclusion are found in those features which resemble the general traffic railroad, viz.: the steam engine, the noise, smoke and vibration, the weight, length and speed of the trains, and the danger to life and property.<sup>35</sup> In an Oregon case the plaintiff sued for damages to his property by reason of the construction and operation of a street railroad in front of his property. The road was operated with steam motors, and appears to have been used solely for street passenger traffic. The plaintiff claimed to own the fee of the street, but the court held that this was immaterial, that the only substantial rights the plaintiff had in the street were the rights of ingress and egress and that these existed the same whether he owned the fee or not; that the construction of a railroad of any kind in a street under authority from the legislature, does not necessarily violate the right of the fee owner and does not "put the land to a use foreign to that contemplated in the establishment of the highway." It also held that if the railway interfered with the enjoyment of the plaintiff's property by obstructing access thereto, to such an extent as to materially depreciate its value, then he was entitled to recover the amount of such depreciation.<sup>36</sup> In Michigan a street railway, operated by a steam motor, constructed on the side of a street, with cuts and fills and laid with T rails, was held to be an additional burden on the fee of the street.<sup>37</sup> A few other cases bearing on the question are referred to in the note, but none of them are directly in point.<sup>38</sup> It is plain, therefore, that the authorities leave it very much in doubt whether a steam motor railroad is a legitimate street use or not.

§ 115f. Electric trolley railroads. —There is a very

<sup>35</sup> East End St. R. R. Co. v. Doyle, 87 Tenn. 747, 13 S. W. Rep. 936, 2 Am. R. R. & Corp. Rep. 747. Compare Smith v. Street R. R. Co., 87 Tenn. 626.

<sup>36</sup> McQuaid v. Portland R. R. Co., 18 Or. 237, 22 Pac. Rep. 899, 1 Am. R. R. & Corp. Rep. 34. To same effect: Paquet v. Mt. Tabor

St. R. R. Co., 18 Or. 233, 22 Pac. Rep. 906.

<sup>37</sup> Nichols v. Ann Arbor & Y. St. R. R. Co., 87 Mich. 361, 49 N. W. Rep. 538. The court stood three to two.

<sup>38</sup> Stange v. Hill & West Du-buque St. R. R. Co., 54 Ia. 669; Stanley v. City of Davenport, 54

unanimous concurrence of the courts in the position that the construction and operation of a street passenger railway on the surface of a street by means of the trolley system is a legitimate street use and not the imposition of an additional burden on the fee, and that the abutter, whether he owns the fee or not, is not entitled to compensation for any damages resulting therefrom.<sup>39</sup> The first case to be de-

Ia. 463; *Williams v. City Electric St. R. R. Co.*, 41 Fed. Rep. 556; *Hussner v. Brooklyn City R. R. Co.*, 114 N. Y. 433; *Onset St. R. R. Co. v. County Comrs.*, 154 Mass. 395, 28 N. E. Rep. 286.

<sup>39</sup> *Taggart v. Newport St. R. R. Co.*, 16 R. I. 668, 19 Atl. Rep. 326, 2 Am. R. R. & Corp. Rep. 44; *Lockhart v. Craig St. R. R. Co.*, 139 Pa. St. 419, 21 Atl. Rep. 26; *New York etc. R. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. Rep. 953; *Chicago B. & Q. R. R. Co. v. West Chicago St. R. R. Co.*, 156 Ill. 270, 40 N. E. Rep. 1008, 12 Am. R. R. & Corp. Rep. 522; *Chicago etc. T. R. R. Co. v. Whiting*, 139 Ind. 297, 38 N. E. Rep. 604, 11 Am. R. R. & Corp. Rep. 507; *Louisville Bagging Mfg. Co. v. Central Pass. R. R. Co.*, 95 Ky. 50, 23 S. W. Rep. 592; *Detroit City R. R. Co. v. Mills*, 85 Mich. 634, 48 N. W. Rep. 1007; *People v. Ft. Wayne & E. R. R. Co.*, 92 Mich. 522, 52 N. W. Rep. 1010; *Dean v. Ann Arbor St. R. R. Co.*, 93 Mich. 330, 53 N. W. Rep. 396; *Niemann v. Detroit Suburban St. R. R. Co.*, 103 Mich. 256, 61 N. W. Rep. 519; *Tracy v. Troy & L. R. R. Co.*, 54 Hun. 550, 27 N. Y. St. 633, 7 N. Y. Supp. 892; *Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass.*, 48 Ohio St. 390, 27 N. E. Rep. 890,

4 Am. R. R. & Corp. Rep. 533; *Mt. Adams etc. R. R. Co. v. Winslow*, 3 Ohio C. C. 425; *Simmons v. City of Toledo*, 5 Ohio C. C. 124; *Lockhart v. Craig St. R. R. Co.*, 8 Pa. Co. Ct. 470; *Commonwealth v. West Chester*, 9 Pa. Co. Ct. 542; *Hellman v. Lebanon & A. R. R. Co.*, 10 Pa. Co. Ct. 241; *Central Pa. Tel. etc. Co. v. Wilkes-Barre etc. R. R. Co.*, 11 Pa. Co. Ct. 417; *Cumberland Tel. & Tel. Co. v. United Electric R. R. Co.*, 93 Tenn. 492, 29 S. W. Rep. 104, 10 Am. R. R. & Corp. Rep. 549; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327; *Canasota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146; *Howe v. West End St. R. R. Co.*, 167 Mass. 46, 44 N. E. Rep. 386; *Placke v. Union Depot R. R. Co.*, 140 Mo. 634; *State v. Jersey City*, 57 N. J. L. 293, 30 Atl. Rep. 531; *State v. Trenton Pass. R. R. Co.*, 58 N. J. L. 666, 34 Atl. Rep. 1090 (Court of Errors and Apps.); *Simmons v. Toledo*, 8 Ohio C. C. 535; *Limburger v. San Antonio Rapid Transit St. R. R. Co.*, 88 Tex. 79, 30 S. W. Rep. 533; *Birmingham Traction Co. v. Birmingham R. R. & Elec. Co.*, 119 Ala. 137, 24 So. Rep. 502; *Chicago etc. R. R. Co. v. General Electric Co.*, 79 Ill. App. 569; *Snyder v. Ft. Mad-*

cided by a court of last resort was in Rhode Island.<sup>40</sup> The object of the suit was to enjoin the defendant from erecting and maintaining poles and wires in the street in front of the plaintiff's property, for the purpose of operating its road by means of electricity. The court, while recognizing the distinction between the ordinary steam railroad and the horse railroad, held that the distinction properly rested "not on any difference in the motive power, but in the different effects produced by them, respectively, on the highways or streets which they occupy." It held that a street railway, operated in the usual manner, was in furtherance of the original uses of the street, and not obstructive of such uses, and that the use of electricity as a motive power made no difference; that as the motive power was not the criterion, electricity might be used, and the poles and wires necessary to conduct the electricity were thus "directly ancillary to the uses of the street as such." In Pennsylvania it is held that an electric railway cannot be laid down upon a country road though it is a proper use of city or village streets.<sup>41</sup> The decision goes both upon the ground that the statutes in regard to street railroads were not intended to apply to country roads and also upon the ground that a distinction exists between urban and rural highways and that the latter are not subject to many uses which the former are. Trolley poles should be so placed as to do no unnecessary damage to the abutting property.<sup>42</sup>

§ 115g. **Underground railroads in streets.**—Railroads

ison St. R. R. Co., 105 Ia. 284; Taylor v. Portsmouth etc. R. R. Co., 91 Me. 193; Poole v. Falls Road Elec. R. R. Co., 88 Md. 533, 41 Atl. Rep. 1069; Schoff v. Cleveland etc. R. R. Co., 16 Ohio C. C. 252. A trolley railroad was held to be an additional burden on the fee of the street in Clark v. Middletown-Goshen Traction Co., 10 App. Div. 354, 41 N. Y. Supp. 1109. So in Nebraska, as to the poles and wires, Jaynes v.

Omaha St. R. R. Co., 53 Neb. 631, 74 N. W. Rep. 67.

<sup>40</sup> Taggart v. Newport St. R. R. Co., 16 R. I. 668, 19 Atl. Rep. 326, 2 Am. R. R. & Corp. Rep. 44, 1890.

<sup>41</sup> Pennsylvania R. R. Co. v. Montgomery County Pass. R. R. Co., 167 Pa. St. 62, 31 Atl. Rep. 468, reversing 14 Pa. Co. Ct. 88, 3 Pa. Dist. Ct. 58.

<sup>42</sup> Snyder v. Ft. Madison St. R. R. Co., 105 Ia. 284.

underneath the streets have so far not been considered practicable in this country. In the matter of New York District Railway Co.,<sup>43</sup> a proposed railway, confined to the limits of a city and constructed on the streets underneath their surface was held to be a street railway. The case was an application by the railway company for the appointment of commissioners to determine whether its railroad ought to be built. The question whether such a railway was a legitimate street use or whether abutting owners would be entitled to compensation in case their property was injured or depreciated thereby was not before the court. The court would seem to indicate that they would be. "Where the railway runs under the streets, the adjoining owners are as much and as dangerously affected as where it runs on their surface or above them. Whether the new surface is safe and sufficient, or weak and perilous, and invites or frightens away passage; whether the openings obstruct or hinder access to the abutter, or pour out through the ventilators smoke and steam upon his premises; whether his vaults and foundations will remain safe and secure, or be undermined or weakened by vibration; whether his gas and water supply will continue ample and convenient, and the new sewerage work him no injury; all these are to him questions of vital importance, affecting his comfort and convenience, the success of his business and the value of his property."<sup>44</sup>

§ 115h. **Street railroads. — General conclusions.**—As already shown a street railroad is ordinarily understood to mean a railroad constructed and operated in a public street and confined to local passenger traffic.<sup>45</sup> In addition to the cases cited in the preceding sections there are many others which hold that a street railroad, as thus defined, is a legiti-

<sup>43</sup> 107 N. Y. 42. See *Terry v. Richmond*, 94 Va. 537. In this case it was held that a railroad, which had authority to go through a street in a tunnel, must make compensation for injury to private rights.

<sup>44</sup> The legislature may authorize the construction of a subway for railroads in the streets of a city without the consent of such city. *Prince v. Crocker*, 116 Mass. 347, 44 N. E. Rep. 446.

<sup>45</sup> Ante § 110a.

mate street use, without taking into account the motive power or the way in which it is applied.<sup>46</sup>

In the history of street railroads, we have in the order of time, as a propelling power: first, animals; second, steam, and third, electricity. For twenty years or more after the introduction of street railroads, they were operated by animal power exclusively. Horse railroads and street railroads were for a long time practically synonymous. During this time the doctrine was worked out by the courts that horse railroads were a legitimate street use. The reasons assigned in support of this doctrine consisted in the tracks being laid on the surface of the street in such manner as to be readily crossed or used longitudinally by ordinary vehicles, in the motive power being the same as that of ordinary vehicles, in fact that the cars were operated with no more noise, jar or disturbance than that produced by other vehicles, and in the fact that their business consisted in conveying passengers from one point to another on the street in aid of the ordinary street traffic. The horse railroad decisions were also founded upon certain negative reasons, so to speak, or particulars which distinguish them from the steam railroad. They were held to be legitimate street uses because they presented certain positive characteristics, and also because they did not present certain other characteristics which were peculiar to steam railroads. Thus horse railroads were distinguished from steam railroads, in the rails and construction of the track, in the motive power, in the speed with which the cars were propelled, in the noise and vibrations produced, the smoke and steam emitted, the liability of the engine to frighten horses, the danger to life and limb and the size and weight of the cars and loco-

<sup>46</sup> Finch v. Riverside & A. R. R. Co., 87 Cal. 597, 25 Pac. Rep. 765; People v. Ft. Wayne & E. R. R. Co., 92 Mich. 522, 52 N. W. Rep. 1010; Taylor v. Bay City St. R. R. Co., 101 Mich. 140, 59 N. W. Rep. 447; Elfelt v. Stillwater St. R. R. Co., 53 Minn. 68, 55 N. W. Rep. 116; Ransom v. Citi-

zens' R. R. Co., 104 Mo. 375, 16 S. W. Rep. 416; Perry v. Wilkes-Barre & K. Pass. R. R. Co., 4 Luzerne Leg. Reg. Rep. 519; Scranton etc. Traction Co. v. Del. & H. Canal Co., 1 Pa. Supr. Ct. 409; Smith v. East End St. R. R. Co., 87 Tenn. 626, 11 S. W. Rep. 709; Haskell v. Denver Tramway Co.,

motive.<sup>47</sup> When the steam motor and electric roads came before the courts, the doctrine in regard to horse railroads was already well established. The phrase street railroads was conveniently substituted for that of horse railroads in the formulæ of this doctrine, and the horse railroad cases were thus made to sanction the steam motor and electric railroad. Every reason but one on which the horse railroad decisions were founded was disregarded. It was held

23 Col. 60, 46 Pac. Rep. 121; Merri-  
 rick v. Intramontaine R. R. Co.,  
 118 N. C. 1081, 24 S. E. Rep. 667.

<sup>47</sup> Thus in *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267, it is said: "Considering the developments of the railroads of the country, it is now perfectly obvious that the use of a public highway longitudinally by a railroad operated by steam, is a use entirely inconsistent with and destructive of the public use to which the highway was originally devoted. The rate of speed at which such roads are operated are dangerous to the public, who would otherwise use the highway. It makes use of rails not adapted to, but obstructive of, the ordinary public use of the highway by the usual vehicles of travel thereon. The noise, the danger, the obstruction of its road-bed, all combine to make the use of the highway by such a railroad incompatible with its general use as a public highway. \* \* \* It is obvious, however, that an ordinary horse railroad, in occupying a highway with its track, and making use of it with its cars, produces a different result from that produced by such an occupation and use by a railroad operated by steam. By legislative direction,

the track of the horse railroad is required to be (as in this case) so constructed not only as not to interfere with or prevent the passage of other vehicles, but to be adapted to such passage both across and along the rails. The cars are drawn by animals such as usually draw the vehicles used on public highways. They carry along the highway such passengers as otherwise would be obliged to pass over it on foot or in other vehicles, and do so with no more injury in the way of noise, jar, or disturbance than would be occasioned by the passage of other vehicles. The use, if it be novel and peculiar in its form, is but a modification of the original use to which the highway was devoted when it became a highway. The burden imposed thereby upon the land owner, so far as the use of his property is concerned, is identical in kind and no greater in degree than was originally imposed upon the land when the highway was opened."

In *South Carolina R. R. Co. v. Stein*, 44 Ga. 546, 558 (1871), it is said: "I think the streets may be used, and bars laid upon them and cars drawn over them by horses; but there is something in a locomotive power, in throw-

that the track need not be like the horse railroad track, but might consist of T rails.<sup>48</sup> It was held that the motive power was immaterial,<sup>49</sup> and the matter of noise, smoke and vibration was lost sight of altogether. The whole matter was made to turn upon the nature of the traffic, the transportation of passengers from one point to another upon the street.

Considering all the cases and having due regard to the weight of authority and the trend of judicial opinion we should say that the general doctrine to be extracted from the street railroad cases is that a railroad is a legitimate street use provided, first, that the road is devoted exclusively to street passenger traffic, and, second, that its track is laid to conform to the surface of the street, and so as to

ing smoke into the houses along the street, its tremendous weight shaking the houses and breaking plastering and walls; and in the noise and screeching of whistles, which, in the machinery employed, may make it the subject matter of injury, which the horse car, slowly driving along, would not occasion. It is not in the use of the street for cars, but in the mode of use." In *Hinchman v. Paterson*, H. R. Co., 17 N. J. Eq. 75, 80, 1864, the chancellor says of horse railways: "They are ordinarily, as in this case required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that pro-

duced by omnibuses and other vehicles in ordinary use."

See also *Hodges v. Baltimore Union Pass. R. R. Co.*, 58 Md. 603; *Indianapolis etc. R. R. Co. v. Huntley*, 67 Ill. 439, 444; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; *Williams v. New York Central etc. R. R. Co.*, 16 N. Y. 97, 108; *Im-lay v. Union Branch R. R. Co.*, 26 Conn. 249.

<sup>48</sup> *Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112; *Niemann v. Detroit Suburban St. R. R. Co.*, 103 Mich. 256, 61 N. W. Rep. 519.

<sup>49</sup> *Briggs v. Lewiston etc. Horse R. R. Co.*, 79 Me. 363; *Halsey v. Rapid Transit R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859; *Williams v. City Electric St. R. R. Co.*, 41 Fed. Rep. 556; *Taggart v. Newport St. R. R. Co.*, 16 R. I. 326, 19 Atl. Rep. 326, 2 Am. R. R. & Corp. Rep. 44; *Rafferty v. Cen-*



obstruct ordinary travel as little as possible. This excludes a road with cuts and fills, because of the cuts and fills.<sup>50</sup> It excludes the elevated railroad, because of the elevation of the tracks above the surface and the superstructure which such elevation makes necessary. It excludes the commercial railroad because of the nature of its traffic. It admits any sort of motive power and any sort of motor; it admits any size or weight of cars and trains of any length; it admits any sort of superstructure or substructure which may be necessary to apply the motive power. A street railroad operated by means of an "underground trolley" has been held not to be an additional burden.<sup>51</sup>

§ 115i. Railroads as legitimate street uses.—**Author's views.**—The foregoing review of cases shows how conflicting and irreconcilable are the authorities. The weight of authority is that a street passenger railroad, laid on the surface or established grade of a street, is a legitimate street use, while all other railroads are not.<sup>52</sup> But what rational basis is there for a distinction between freight and passenger traffic? It cannot be denied that streets and highways have been established as much for the transportation of freight as for the movement of persons. Upon this point the reasoning of the Supreme Court of California is very convincing.<sup>53</sup> To say that one railroad is a legitimate street use because it carries only passengers and that another is not a legitimate use because it carries both freight and passengers, is purely arbitrary. It is a distinction which can-

tral Traction Co., 147 Pa. St. 579, 23 Atl. Rep. 884.

<sup>50</sup> *Nichols v. Ann Arbor etc. R. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538; *Westheffer v. Lebanon & A. St. R. R. Co.*, 163 Pa. St. 54, 29 Atl. Rep. 873. See *Green v. City & Suburban R. R. Co.*, 78 Md. 294, 28 Atl. Rep. 628, and post § 121a.

<sup>51</sup> *St. Michael's P. E. Church v.*

*Forty-second St. etc. R. R. Co.*, 26 Misc. N. Y. 601.

<sup>52</sup> See § 115h.

<sup>53</sup> *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25. The court says: "A 'street railway' has been defined as 'a railway laid down upon roads or streets for the purpose of carrying passengers.' Elliott, *supra*, 557. It is further said by

not be founded upon the nature and uses of streets. Nor can any logical distinction be made between local and long distance traffic. It is just as legitimate to use the streets of a city for traffic destined to a point any distance beyond the city limits, as to a point within the city limits.

It seems to the writer that there is no rational basis for a distinction between surface roads and that either all should be admitted as legitimate, or all excluded as illegitimate, street uses. As between these alternatives the latter should be chosen. A railroad involves a fixed and per-

the same author that 'the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight.' It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily-laden freight-trains are drawn cannot be considered a street railway. Street cars are little more than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and, therefore, the

user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree, and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the

manent structure in the street which is more or less of an obstruction to ordinary travel. If one track is a legitimate use there seems to be no escape from the consequence that any number of tracks is legitimate. It rests simply with the

highway, as we know, it became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway sixteen feet in width, constructed for the transportation of burdens, while the paths of eight feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them, by grade, width and structure of roadbed, to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned, so far as ease, speed and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening a road or street, and, therefore, add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An inter-

minable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are sub-

proper public authorities to determine how many tracks will best subserve the public interests.<sup>54</sup> And so a street might be filled with railroad tracks and all ordinary traffic excluded therefrom, and yet be held to be devoted to legitimate and proper street uses.<sup>55</sup> And this is a palpable absurdity. For these reasons we think that railroads are not legitimate street uses. This conclusion does not prevent the use of streets by railroads, since property devoted to one public use may be taken for another public use or a joint use permitted. It simply prevents such use being made without just compensation to abutting property owners.

§ 115j. Whether a railroad is a proper or legitimate street use is a question of law.—Nearly all the cases which determine whether a railroad is, or is not, a legitimate street use, treat the question as one of law.<sup>56</sup> The question was directly passed upon in *Williams v. Brooklyn El. R. R. Co.*,<sup>57</sup> in which the court says: "But it cannot be left to the jury to say whether the structure is or is not one which the legislature or the municipality may authorize as against an abutting owner, upon the theory that it is a question of fact, and not of law, depending upon the extent of the interference in a particular case with the public right of passage or with the enjoyment by the abutting owners of their premises."

§ 116. Authority to occupy a street, how granted and

ject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air shall be interfered with."

<sup>54</sup> See post, § 117a.

<sup>55</sup> "To hold that a railroad is one of the legitimate uses of a public street leads to the inconsistency that the street may be monopolized by a corporation or an individual, and filled with

parallel tracks, which would practically exclude all ordinary travel, and still be said to be devoted to the ordinary uses of a public street." *Theobald v. Louisville R. R. Co.*, 66 Miss. 279, 6 So. Rep. 230.

<sup>56</sup> Perhaps the only exception is to be found in those cases which make the right of recovery depend upon the manner in which the railroad is constructed and used. See § 117a.

<sup>57</sup> 126 N. Y. 96, 26 N. E. Rep. 1048.

construed. — Before a railroad company can lawfully occupy a street, it must have authority to do so from the legislature, or from some municipal corporation having power to grant it. A railroad cannot occupy a street under its general authority to make a location, but such right must be expressly granted or necessarily implied.<sup>58</sup> This is true of all kinds of railroads, for though street railroads are generally held to be a legitimate street use, they are not so in the sense that any who choose may occupy the streets for that purpose. Municipal corporations cannot grant the use of streets for railroad purposes without legislative authority.<sup>59</sup> In case of commercial railroads the prevailing doctrine is that this authority must be given in express terms, and that it cannot be derived from a general power to control and

<sup>58</sup> *State v. Hoboken*, 35 N. J. L. 205; *Cooper v. Alden*, Harr. Mich. 72; *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Springfield v. Conn. River R. R. Co.*, 4 Cush. 63; *Davis v. Mayor etc. of New York*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Wetmore v. Story*, 22 Barb. 414; *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271; *Daly v. Georgia Southern etc. R. R. Co.*, 80 Ga. 793; *Louisville etc. R. R. Co. v. Liebfreid*, 92 Ky. 407, 17 S. W. Rep. 870; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. Rep. 787; *New Orleans, etc. R. R. Co. v. City of New Orleans*, 26 La. An. 517; *Van Horne v. Newark Passenger R. R. Co.*, 48 N. J. Eq. 332, 21 Atl. Rep. 1034; *In re Rochester Electric R. R. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381; *Steel'on Borough v. East Harrisburgh Pass. R. R. Co.*, 11 Pa. Co. Ct. 161; *Watkin v. West Phila. Pass. R. R. Co.*, 1 Pa. Dist. Ct. 463; *Haines v. Twenty-second St. etc. Pass. R. R. Co.*, 1 Pa. Dist. Ct.

506; *Appeal of Pittsburgh etc. R. R. Co.*, 1 Penny. 449; *Hart v. Buchner*, 54 Fed. Rep. 925, 5 C. C. A. 1; *Pembroke v. Canadian Cent. R. R. Co.*, 3 Ontario 503; *Regina v. Train*, 9 Cox C. C. 180; *Chicago etc. R. R. Co. v. Chicago*, 121 Ill. 208; *State v. Board of Chosen Freeholders*, 56 N. J. L. 416, 28 Atl. Rep. 553; *Sloane v. People's Elec. R. R. Co.*, 7 Ohio C. C. 84; *Knoxville v. Africa*, 77 Fed. Rep. 501, 23 C. C. A. 252; *Burlington v. Penn. R. R. Co.*, 56 N. J. Eq. 259, 38 Atl. Rep. 849; *Gray v. New York etc. Traction Co.*, 56 N. J. Eq. 463, 40 Atl. Rep. 21; *Citizens' St. R. R. Co. v. Africa*, 100 Tenn. 26.

<sup>59</sup> *Daly v. Georgia Southern R. R. Co.*, 80 Ga. 793; *Augusta etc. R. R. Co. v. Augusta*, 100 Ga. 701; *Arbenz v. Wheeling etc. R. R. Co.*, 33 W. Va. 1, 10 S. E. Rep. 14; *State v. East Fifth St. R. R. Co.*, 140 Mo. 539; *Beekman v. Third Ave. R. R. Co.*, 13 App. Div. 279, 43 N. Y. Supp. 174; *Potts v. Quaker City El. R. R.*

regulate the streets of the municipality.<sup>60</sup> Whether such general power is sufficient to authorize a municipality to grant the use of its streets to a street railroad company is a disputed question.<sup>61</sup> A want of previous authority may be cured by ratification.<sup>62</sup> The legislature may grant the use

Co., 161 Pa. St. 396, 29 Atl. Rep. 108; Knoxville v. Africa, 77 Fed. Rep. 501, 23 C. C. A. 252; Geneva etc. R. R. Co. v. N. Y. Cent. etc. R. R. Co., 24 App. Div. N. Y. 335; Detroit Citizens' St. R. R. Co. v. Detroit, 110 Mich. 384; Thompson v. Ocean City R. R. Co., 60 N. J. L. 74; Fallon v. Hoboken, 60 N. J. L. 212. The franchise emanates from the State, though granted immediately by a municipality. *Ibid.*

<sup>60</sup> Perry v. New Orleans & Chattanooga R. R. Co., 55 Ala. 413; Covington St. Ry. Co. v. City of Covington, 9 Bush. 127; 2 Dillon, Munic. Corp. § 705; Daly v. Georgia Southern R. R. Co., 80 Ga. 793. A city having power to give such consent and not being restricted to any particular mode, may do so by resolution or vote, as well as by ordinance. Merchant's Union Barb Wire Co. v. Chicago, B. & Q. R. R. Co., 70 Ia. 105. A provision in a city charter authorizing the laying of railroads in streets on consent of a majority of the land-owners was held to refer to horse railroads only. Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43. A provision in a charter that the company should not occupy any street without the consent of the city was held not to confer authority even with consent. Pennsylvania R. R. Co. v. Phila. Belt

R. R. Co., 10 Pa. Co. Ct. 625. And see Asheville St. R. R. Co. v. West Asheville R. R. Co., 114 N. C. 725, 19 S. E. Rep. 697; Talton v. Hoboken, 60 N. J. L. 212; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. Rep. 849.

<sup>61</sup> The following cases deny the authority: Covington Street Ry. Co. v. Covington, 9 Bush. 127; Davis v. New York, 14 N. Y. 506; People v. Kerr, 27 N. Y. 188; Millhau v. Sharp, 27 N. Y. 611. Contra: State v. Jacksonville St. R. R. Co., 29 Fla. 590, 10 So. Rep. 590; Henderson v. Ogden City R. R. Co., 7 Utah 199, 26 Pac. Rep. 286; Ogden City R. R. Co. v. Ogden City, 7 Utah 207, 26 Pac. Rep. 288; Detroit Citizens' St. R. R. Co. v. City of Detroit, 64 Fed. Rep. 628, 12 C. C. A. 365. See People's R. R. Co. v. Memphis R. R. Co., 10 Wall. 38; New Orleans etc. R. R. Co. v. New Orleans, 44 La. An. 748, 11 So. Rep. 77; Same v. Same, 44 La. An. 728, 11 So. Rep. 78; Powell v. Macon etc. R. R. Co., 92 Ga. 209, 17 S. E. Rep. 1027. A grant by a city contrary to law is void. Coolville Pass. R. R. Co. v. Wilkes-Barre Southside R. R. Co., 5 Luzerne Leg. Reg. Rep. 340. A constitutional provision against the granting of special privileges and immunities does not prevent the grant of such a franchise. Atchison St. R. R. Co. v. Mo. Pac. R. R. Co., 31 Kan. 660.

<sup>62</sup> Nash v. Lowry, 37 Minn. 261,

of streets to railroads without the consent of the municipality in which they are situated.<sup>63</sup> But the consent of the municipality is frequently, if not generally required, and when required, is a condition precedent to any valid franchise to use the streets.<sup>64</sup> A consent procured by means of bribery, duress or fraud is invalid.<sup>65</sup> So if it is not given in the manner and in accordance with the conditions imposed

33 N. W. Rep. 787; *Pembroke v. Canada Central R. R. Co.*, 3 Ontario 503. A city may be estopped from alleging that tracks were laid in a street without authority. *Spokane St. R. R. Co. v. City of Spokane Falls*, 6 Wash. 521, 33 Pac. Rep. 1072.

<sup>63</sup> *Appeal of Borough of Millvale*, 131 Pa. St. 1, 18 Atl. Rep. 993, 1 Am. R. R. & Corp. Rep. 151; *Harrisburg City Pass. R. R. Co. v. City of Harrisburg*, 149 Pa. St. 469, 24 Atl. Rep. 56; *Citizens' St. R. R. Co. v. City of Memphis*, 53 Fed. Rep. 715; *State v. Jacksonville St. R. R. Co.*, 29 Fla. 590, 10 So. Rep. 590. But it is otherwise provided by the constitution in Missouri. *State v. Lindell R. R. Co.*, 151 Mo. 162.

<sup>64</sup> *City of Philadelphia v. River Front R. R. Co.*, 173 Pa. St. 334, 34 Atl. Rep. 60; *Appeal of Pittsburgh etc. R. R. Co.*, 1 Penny. 449; *West Jersey Traction Co. v. Camden Horse R. R. Co.*, 53 N. J. Eq. 163, 35 A. 49; *State v. Cape May*, 58 N. J. L. 565, 34 Atl. Rep. 397; *McKeesport v. Citizens' Pass. R. R. Co.*, 2 Pa. Supr. Ct. 249.

The fact that the railroad is laid on a turnpike with the consent of the turnpike corporation will not relieve it from also getting the consent of the municipality. In *re Rochester Electric R.*

*R. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381; *Steelton Borough v. East Harrisburg Pass. R. R. Co.*, 11 Pa. Co. Ct. 161. In all such cases the franchise comes from the state. *Chicago City R. R. Co. v. People*, 73 Ill. 541. A law requiring such consent was held to apply to grants previously made but not acted upon. *Hanson v. Chicago etc. R. R. Co.*, 61 Iowa 588; *Appeal of Lorimer etc. R. R. Co.*, 137 Pa. St. 533, 20 Atl. Rep. 570. But see *Stroudsbourog v. Stroudsbourog Pass. R. R. Co.*, 12 Pa. Co. Ct. 124. Where the act requires the consent of the "local authorities" it means "the officers of the city, town or village whose duties and powers relate to the supervision, care and maintenance of the streets or highways." In *re Rochester Electric R. R. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381.

<sup>65</sup> *Lehigh Coal & Nav. Co. v. Inter-county St. R. R. Co.*, 167 Pa. St. 75, 31 Atl. Rep. 471; *Tamaqua & L. St. R. R. Co. v. Inter-county St. R. R. Co.*, 167 Pa. St. 91, 31 Atl. Rep. 473. An ordinance giving consent was held invalid, where stockholders of the company were members of the council and their votes were necessary to its passage. *Jolly v. Pittsburgh etc. R. R. Co.*, 16 Pa. Co. Ct. 1.

by the statute.<sup>66</sup> Where a company was organized to construct a street railroad through several municipalities, it was held that it must get the consent of all before it could construct any part.<sup>67</sup> A city has no power to authorize railroads upon streets for private use.<sup>68</sup>

There is a difference of opinion in the authorities, as to whether the grant of a franchise to operate a railroad in a street, can be made exclusive, even by authority of the legislature.<sup>69</sup> But it is quite clear that a municipal corporation cannot make such a grant, without express authority,<sup>70</sup> and that a grant will not be construed to be exclusive

<sup>66</sup> *Thompson v. Board of Supervisors*, 111 Cal. 553, 44 Pac. Rep. 230; *People v. Craycroft*, 111 Cal. 544, 44 Pac. Rep. 463; *Avonby-the-Sea L. & I. Co. v. Neptune City*, 53 N. J. Eq. 178, 32 Atl. Rep. 220; *State v. Newark*, 57 N. J. L. 309, 30 Atl. Rep. 528; *State v. Neptune City*, 57 N. J. L. 362, 30 Atl. Rep. 529; *Camden Horse R. Co. v. West Jersey Traction Co.*, 58 N. J. L. 102, 32 Atl. Rep. 72; *State v. Shivers*, 58 N. J. L. 124, 33 Atl. Rep. 55; *Stockton v. North Jersey St. R. R. Co. (N. J. Ch.)*, 34 Atl. Rep. 688; *Beekman v. Third Ave. R. R. Co.*, 13 App. Div. 279, 43 N. Y. Supp. 174.

<sup>67</sup> *Pennsylvania R. R. Co. v. Tuttle Creek Val. El. R. R. Co.*, 179 Pa. St. 584, 36 Atl. Rep. 348.

<sup>68</sup> *Heath v. Des Moines & St. Louis Ry. Co.*, 61 Ia. 11; *Mike-sall v. Durkee*, 34 Kan. 509; *Macon v. Harris*, 75 Ga. 761; *S. C.* 73 Ga. 428; *State v. Trenton*, 36 N. J. L. 79; *Fanning v. Osborne & Co.*, 34 Hun. 121, S. C. 102 N. Y. 441; *Commonwealth v. City of Frankfort*, 92 Ky. 149, 17 S. W. Rep. 287; *Green v. Portland*, 32 Me. 431; *Bradley v. Pharr*, 45 La. An. 426, 12 So. Rep. 618;

*Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. Rep. 1054; *Glaesner v. Anheuser-Busch Brewing Assn.*, 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420; *Appeal of Hartman Steel Co.*, 129 Pa. St. 551, 18 Atl. Rep. 553; *Barker v. Hartman Steel Co.*, 6 Pa. Co. Ct. 183. As to whether a track or railroad is for private or public use see post, § 171.

<sup>69</sup> *Elliott Roads and Streets*, pp. 566-569; 2 Dill. Munic. Corp. §§ 715, 716, 727; *Davis v. New York*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Birmingham etc. R. R. Co. v. Birmingham St. R. R. Co.*, 79 Ala. 465; *Des Moines St. R. R. Co. v. Des Moines etc. R. R. Co.*, 73 Iowa 513, 33 N. W. Rep. 610, 35 N. W. Rep. 602; 11 Am. R. R. & Corp. Rep. 448, note 2.

<sup>70</sup> *St. Louis etc. R. R. Co. v. Belleville*, 20 Ill. App. 580; *Parkhurst v. City of Salem*, 23 Or. 472, 32 Pac. Rep. 304, 7 Am. R. R. & Corp. Rep. 562; *Henderson v. Ogden City R. R. Co.*, 7 Utah 199, 26 Pac. Rep. 286, 11 Am. R. R. & Corp. Rep. 463, note 6 and numerous cases then cited; *New*



unless so expressed.<sup>71</sup> It is held that the grant may be for a period extending beyond the corporate existence of the grantee.<sup>72</sup> In some States municipal corporations are not authorized to grant or consent to the construction of a railroad in a street without the consent of the owners of a certain amount of frontage on the street.<sup>73</sup> We refer in the note to cases on the right of a city to annex conditions to its consent.<sup>74</sup> When a grant has been made and accepted

Orleans City etc. R. R. Co. v. New Orleans, 44 La. An. 748, 11 So. Rep. 77; Same v. Same, 44 La. An. 728, 11 So. Rep. 78; New Orleans City R. R. Co. v. Crescent City R. R. Co., 12 Fed. Rep. 308; Florida Central R. R. Co. v. Ocala St. R. R. Co., 39 Fla. 306; Detroit Citizens' St. R. R. Co. v. Detroit, 110 Mich. 384; Detroit Citizens' St. R. R. Co. v. Detroit, 171 U. S. 48.

<sup>71</sup> North Baltimore Pass. R. R. Co. v. Mayor etc. of Baltimore, 75 Md. 247, 23 Atl. Rep. 470; Pennsylvania S. O. R. R. Co. v. Philadelphia etc. R. R. Co., 157 Pa. St. 42, 27 Atl. Rep. 683; Philadelphia etc. R. R. Co. v. Berks County, 2 Woodward's Decs. 361; City of Houston v. Houston St. R. R. Co., 83 Tex. 548, 19 S. W. Rep. 127, 6 Am. R. R. & Corp. Rep. 106; 11 Am. R. R. & Corp. Rep. p. 463, note 7 and cases cited.

<sup>72</sup> Detroit Citizens' St. R. R. Co. v. City of Detroit, 64 Fed. Rep. 628, 12 C. C. A. 365. As to power of city to grant franchise for a term of years see City of Houston v. Houston City St. R. R. Co., 83 Tex. 548, 19 S. W. Rep. 127, 6 Am. R. R. & Corp. Rep. 106; People's R. R. v. Memphis R. R., 10 Wall. 38; City of Detroit v. Detroit City R. R. Co., 56 Fed. Rep. 867; Louisville

Trust Co. v. City of Cincinnati, 75 Fed. Rep. 716.

<sup>73</sup> Without attempting to discuss the questions arising under such statutes we refer to some cases thereon. Doane v. Chicago City R. R. Co., 160 Ill. 22, 45 N. E. Rep. 507; White v. Manhattan R. R. Co., 8 Am. R. R. & Corp. Rep. 739, 748 and cases cited in note; Hunt v. Chicago Horse & D. R. R. Co., 121 Ills. 638; In re Third Ave. R. R. Co., 121 N. Y. 536, 24 N. E. Rep. 951; S. C. 56 Hun, 537, 31 N. Y. St. 645, 9 N. Y. Supp. 833; Wiggins Ferry Co. v. East St. Louis etc. R. R. Co., 107 Ills. 450; Tibbets v. West & South Towns St. R. R. Co., 153 Ills. 147, 38 N. E. Rep. 664; Doane v. Lake St. El. R. R. Co., 165 Ill. 510, 46 N. E. Rep. 520; Mt. Auburn Cable R. R. Co. v. Neare (Ohio), 42 N. E. Rep. 768; Sloane v. People's Elec. R. R. Co., 7 Ohio C. C. 84; Simmons v. Toledo, 8 Ohio C. C. 535; Beeson v. Chicago, 75 Fed. Rep. 880.

<sup>74</sup> People v. O'Brien, 111 N. Y. 1, 18 N. E. Rep. 692; City of Allegheny v. Millvale etc. St. R. R. Co., 159 Pa. St. 411, 28 Atl. Rep. 202; Citizens Horse R. R. Co. v. City of Belleville, 47 Ill. App. 388; Byrne v. Chicago General R. R. Co., 63 Ill. App. 438; Township of Plymouth v. Chest-

or acted upon it constitutes an irrevocable contract.<sup>75</sup> In Maryland it has been held that such a grant may be revoked by a city after the tracks are laid, but there would be an obligation to make compensation.<sup>76</sup> Where the grant is to construct a road within a limited time, the grant will be forfeited if the condition is not complied with.<sup>77</sup> A municipal corporation by granting the franchise is not thereby made liable for damages by the construction and operation of the road.<sup>78</sup>

Authority to occupy a street, whether obtained directly from the legislature or from a local municipality, only protects the company to the extent of the public right or easement in the street, and leaves the company to deal with

nut Hill & N. R. R. Co., 168 Pa. St. 181; 32 Atl. Rep. 19; S. C. 15 Pa. Co. Ct. 442; *Burke v. Cumberland Traction Co.*, 15 Pa. Co. Ct. 159; *Byrne v. Chicago General R. R. Co.*, 169 Ill. 75; *People v. Suburban R. R. Co.*, 178 Ill. 594; *Chester v. Wabash etc. R. R. Co.*, 182 Ill. 382. Illegal conditions do not vitiate the grant. *Galveston etc. R. R. Co. v. Galveston*, 91 Tex. 17.

<sup>75</sup> *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; *Town of Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. Rep. 676; *City of Belleville v. Citizens' Horse R. R. Co.*, 152 Ill. 171, 38 N. E. Rep. 584; *Columbus v. Columbus etc. R. R. Co.*, 37 Ind. 294; *East Louisiana R. R. Co. v. New Orleans*, 46 La. An. 526, 15 So. Rep. 157; *Baltimore T. & G. Co. v. City of Baltimore*, 64 Fed. Rep. 153; *Willis v. Railroad*, 188 Pa. St. 71. The grant may of course be revoked before acceptance. *East St. Louis Union R. R. Co. v. East St. Louis*, 39 Ills. App. 398.

<sup>76</sup> *Lake Roland El. R. R. Co. v. City of Baltimore*, 77 Md. 352, 26 Atl. Rep. 510, 7 Am. R. R. & Corp. Rep. 619.

<sup>77</sup> *Atchison Street R. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. Rep. 587; *State v. Latrobe*, 81 Md. 222, 31 Atl. Rep. 788.

<sup>78</sup> *Green v. Portland*, 32 Me. 431; *Sorensen v. Greeley*, 10 Col. 369; *Hatch v. Tacoma etc. R. R. Co.*, 6 Wash. 1, 32 Pac. Rep. 1063; *Kaufman v. Tacoma etc. R. R. Co.*, 11 Wash. 632, 40 Pac. Rep. 137. We refer to a few miscellaneous cases on the giving of authority to railroads to occupy streets. *Matter of Crosstown St. R. R. Co.*, 68 Hun 236, 22 N. Y. Supp. 818; *Adamson v. Nassau Electric R. R. Co.*, 89 Hun 261, 34 N. Y. Supp. 1073; S. C. 12 Misc. 600; *Atkinson v. Asheville St. R. R. Co.*, 113 N. C. 581, 18 S. E. Rep. 284; *Rahn Township v. Tamaqua & L. St. R. R. Co.*, 167 Pa. St. 84, 31 Atl. Rep. 472; *Homestead St. R. R. Co. v. Pittsburgh etc. St. R. R. Co.*,

private rights as in other cases.<sup>79</sup> Authority to occupy a street includes authority to use a bridge forming part of the street, even though it belongs to a private corporation.<sup>80</sup> Grants of authority are strictly construed.<sup>81</sup> Authority to occupy a street has been held to include authority to construct a turnout to a depot,<sup>82</sup> and to lay switch-tracks to abutting property.<sup>83</sup> Authority to build an elevated railroad in a street does not authorize any part of the depot or stairs to be constructed on a cross street.<sup>84</sup> Where a company must specify its route in its articles of incorporation, the consent of the city that it may occupy streets not specified in its route, is of no validity.<sup>85</sup> Authority to lay a single track with necessary switches, does not justify switches of unnecessary length and frequency so as to make practically a double track.<sup>86</sup> Under a grant to construct a surface road and to intersect, cross, join and unite with

166 Pa. St. 162, 30 Atl. Rep. 950.

<sup>79</sup> *Gray v. St. Paul & Pacific R. Co.*, 13 Minn. 315; *Cape Girardeau etc. Road Co. v. Renfoe*, 58 Mo. 265; *Washington Cemetery v. P. P. & C. I. R. R. Co.* 68 N. Y. 591; *Matter of New York El. R. R. Co.*, 70 N. Y. 327, 354; *Lamm v. Chicago etc. R. R. Co.*, 45 Minn. 71, 47 N. W. Rep. 455.

<sup>80</sup> *Pittsburgh etc. R. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37, 30 Atl. Rep. 511. But the railroad company may be made to bear the expense of strengthening the bridge if necessary, and may be prevented from using the bridge until the work is done. *Berks County v. Reading City Pass. R. R. Co.*, 167 Pa. St. 102, 31 Atl. Rep. 474, 663; *Laure v. Oil City St. R. R. Co.*, 170 Pa. St. 249, 32 Atl. Rep. 977. See *State v. Board of Chosen Freeholders*, 56 N. J. L. 416, 28 Atl. Rep. 553.

<sup>81</sup> *City of Philadelphia v. Citi-*

*zens' Pass. R. R. Co.*, 151 Pa. St. 128, 24 Atl. Rep. 1099; *State v. City of Trenton*, 54 N. J. L. 92, 23 Atl. Rep. 281; *State v. City of Newark*, 54 N. J. L. 102, 23 Atl. Rep. 284; *Junction Pass. R. R. Co. v. Williamsport Pass. R. R. Co.*, 154 Pa. St. 116, 26 Atl. Rep. 295; *People v. Newton*, 112 N. Y. 396, 19 N. E. Rep. 831.

<sup>82</sup> *New Orleans etc. R. R. Co. v. 2d Municipality*, 1 La. An. 128; *Knight v. Carrolton R. R. Co.*, 9 La. An. 284.

<sup>83</sup> *Morristown v. Pennsylvania R. R. Co.*, 3 Mont. Co. L. Rep. 5.

<sup>84</sup> *Mattlage v. New York El. R. R. Co.*, 67 How. Pr. 232; *S. C. 14 Daly 1*; and see *Douglass v. Leavenworth*, 6 Kan. App. 96; *Birrell v. New York etc. R. R. Co.*, 41 N. Y. App. Div. 506.

<sup>85</sup> *Knoxville v. Africa*, 77 Fed. Rep. 501, 23 C. C. A. 252.

<sup>86</sup> *Willis v. Railroad*, 188 Pa. St. 56, 41 Atl. Rep. 307.

other railroads, an incline cannot be built to connect with an elevated road.<sup>87</sup> Authority to occupy a street when necessary means a practical necessity.<sup>88</sup>

§ 117. **Rights of company as to manner of constructing and operating road.**—If the grant of authority specifies the particular part of the street to be occupied, or imposes any conditions as to construction or operation, such provisions must be complied with.<sup>89</sup> Every such grant is accompanied with the implied condition, that the road shall be so constructed and operated as to produce no unnecessary or unreasonable interference with public or private rights.<sup>90</sup> This

<sup>87</sup> *Eldert v. Long Island Elec. R. R. Co.*, 28 App. Div. N. Y. 451.

<sup>88</sup> *Wayzata v. Great Northern R. R. Co.*, 67 Minn. 385.

<sup>89</sup> *Pacific R. R. Co. v. Leavenworth City*, 1 Dill. 393. Where a statute required tracks to be placed as nearly as possible in the middle of a street, it means as nearly as practicable. *Finch v. Riverside & A. R. R. Co.*, 87 Cal. 597, 25 Pac. Rep. 765.

<sup>90</sup> *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Chicago, B. & Q. R. R. Co. v. City of Quincy*, 139 Ills. 355, 28 N. E. Rep. 1069; *Town of Rice v. Chicago etc. R. R. Co.*, 30 Ills. App. 481; *Pennsylvania S. V. R. R. Co. v. Phila. & R. R. Co.*, 157 Pa. St. 42, 27 Atl. Rep. 683; *Jones v. Erie & W. R. R. Co.*, 169 Pa. St. 333, 32 Atl. Rep. 535; *Philadelphia & N. R. R. Co. v. Berks County R. R. Co.*, 2 Woodward's Decs. 361; *Stroudsboung Borough v. Stroudsboung Pass. R. R. Co.*, 12 Pa. Co. Ct. 124; *Stroudsboung Borough v. Wilkes-Barre etc. R. R. Co.*, 12 Pa. Co. Ct. 395; *Arbenz v. Wheeling & H. R. R. Co.*, 33 W. Va. 1, 10 S. E. Rep. 14; *City of Moundville v. Ohio R. R.*

*Co.*, 37 W. Va. 92, 16 S. E. Rep. 514; *Evans v. Chicago etc. R. R. Co.*, 86 Wis. 397, 57 N. W. Rep. 354; *Louisville & N. R. R. Co. v. Whitley Co.*, 95 Ky. 215, 24 S. W. Rep. 604; *Hepting v. New Orleans Pass. R. R. Co.*, 36 La. An. 898; *Berks & D. Turnpike Co. v. Lebanon & M. St. R. R. Co.*, 3 Pa. Dist. Ct. 55; *St. Louis etc. R. R. Co. v. Neely*, 63 Ark. 636; *Poole v. Falls Road Elec. R. R. Co.*, 88 Md. 533, 41 Atl. Rep. 1069; *Hellman v. Lebanon etc. R. R. Co.*, 180 Pa. St. 627, 37 Atl. Rep. 199. In the last case the court says: "When permission is given them to occupy a public street, they acquire thereby not an exclusive right upon its surface, but a right concurrent with that of the general public. Their cars are a substitute for the private carriage and the public omnibus. They must move them along their tracks upon the surface of the street to the grade of which they are required to conform. They have no right to grade or fill or in any manner interfere with the access to private property from the highway, or so to construct the road as to interfere

necessarily follows from the fact that the user is a joint one, and that the highway is not abandoned, though the soil is devoted to an additional public use. Thus, under a general authority to occupy a street, the road must be laid substantially at the grade of the street, that is, with only such elevations and depressions as are necessary to secure a regular grade,<sup>91</sup> and in the traveled roadway, and not over the curb or sidewalk.<sup>92</sup> Under such general authority only a single track can be laid down, and that can only be used for purposes of transportation.<sup>93</sup> The company, having once

with public travel, or disturb adjacent owners." p. 628.

<sup>91</sup> *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Hutton v. Indiana Central Ry. Co.*, 7 Ind. 522; *Protzman v. Indianapolis & Cin. R. R. Co.*, 9 Ind. 467; *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180; *S. C. 34 Mo.*, 259; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Swenson v. Lexington*, 69 Mo. 157; *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 318; *Savannah A. & G. R. R. Co. v. Shiels*, 33 Ga. 601; *Helleman v. Lebanon etc. R. R. Co.*, 180 Pa. St. 627, 37 Atl. Rep. 199; *Berks & D. Turnpike Co. v. Lebanon & M. St. R. R. Co.*, 3 Pa. Dist. Ct. 55. Authority to lay tracks on a street at a given grade, means that the final surface must be of that grade, not that the street may be brought to that grade and then the ties and rails placed on top of that. *Given v. Des Moines*, 70 Ia. 637. But in such case the company will be estopped from alleging that its road was not properly constructed. *Eslich v. Mason City etc. R. R. Co.*, 75 Ia. 443, 39 N. W. Rep. 700.

<sup>92</sup> *Lavison v. Chicago, St. L. & N. O. Ry. Co.*, 1 McGloin, La. 299;

but see contra, *Koelmel v. New Orleans, M. & C. R. R. Co.*, 27 La. An. 442; *Kennedy v. Detroit R. R. Co.* (Mich.), 66 N. W. Rep. 495. If some other location than the middle of the street is specified in the grant, the road may, of course, be laid as specified. *Kellinger v. Forty-second St. R. R. Co.*, 50 N. Y. 206; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Clark v. Second etc. St. R. R. Co.*, 3 Phil. 259. But in Ohio it is held that if the track is so located as to be an obstruction to the convenient access to the abutting property, the owner is entitled to compensation. *Street Railway v. Cumminsville*, 14 Ohio St. 523.

<sup>93</sup> *Lacland v. North Missouri R. R. Co.*, 31 Mo. 180; *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; contra: *Lavis v. C. & N. W. Ry. Co.*, 46 Ia. 389; and see *Street Railway Co. v. West Side Ry. Co.*, 48 Mich. 433. In *Indianapolis & St. Louis R. R. Co. v. Calvert*, 110 Ind. 555, it was held that one who had granted the right to lay one track in the street in front of his property could not enjoin the construction of a switch which was laid on

located its track, has exhausted its right of choice, and may not move it to a different location.<sup>94</sup> The company may not build a depot<sup>95</sup> or passenger platform<sup>96</sup> in the street, or turn it into a switch yard or freight delivery or place for the storage of cars.<sup>97</sup> The company may lay a

the same ties and projected fourteen inches for a space of nineteen feet opposite his property. But authority to construct a single track was held not to authorize side tracks in *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271. Authority to lay tracks or to lay a single or double track is not exhausted by laying one track. *Varwig v. Cleveland etc. R. R. Co.*, 6 Ohio C. C. 439; *Ransom v. Citizens' R. R. Co.*, 104 Mo. 375, 16 S. W. Rep. 416.

<sup>94</sup> *Little Miami R. R. Co. v. Maylor*, 2 Ohio St. 235; especially if the new position is more injurious to abutting property. *Dubach v. Hannibal & St. Joseph R. R. Co.*, 89 Mo. 483. See contra, *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. St. 340. Where a company had authority to occupy so much of certain streets as "may be necessary for the construction of its track, sidings and branches," and it constructed and used a single track for many years, it was held to have exhausted its power. *Pennsylvania S. V. R. R. Co. v. Philadelphia & N. R. R. Co.*, 157 Pa. St. 42, 27 Atl. Rep. 683. It is held that a company may change the gauge of its road at pleasure, when not restricted. *Appeal of Borough of Millvale*, 131 Pa. St. 1, 18 Atl. Rep. 993, 1 Am. R. R. & Corp. Rep. 151. And see *Denver etc. R. R. Co. v. Barsaloux*,

15 Col. 290, 25 Pac. Rep. 165; *Denver etc. R. R. Co. v. Toohey*, 15 Col. 297, 25 Pac. Rep. 166. If tracks are first laid too near together, they may be changed to give the proper space. *Simpson v. Phila. etc. R. R. Co.*, 4 Mont. Co. L. Rep. 102.

<sup>95</sup> *Barney v. Keokuk*, 4 Dill. 593, affirmed 94 U. S. 324; *Cooper v. Alden*, Harr. Mich. 72; *Village of Waycata v. Great Northern R. R. Co.*, 50 Minn. 438, 52 N. W. Rep. 913. Authority to construct an elevated railroad on a street does not authorize a depot or stairs on an intersecting street. *Mattlage v. New York El. Ry. Co.*, 67 How. Pr. 232.

<sup>96</sup> *Higbee v. Camden & Amboy R. R. Co.*, 19 N. J. Eq. 276; 20 N. J. Eq. 435.

<sup>97</sup> *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180; *Trook v. B. & P. R. R. Co.*, 3 McArthur, D. C. 392; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; 47 Mich. 393; *Mahady v. Brunswick Ry. Co.*, 91 N. Y. 148; *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316; *Neitzey v. Baltimore, etc. R. R. Co.*, 5 Mackey 34; *Glick v. Baltimore & O. R. R. Co.*, 19 D. C. 412; *Fitzgerald v. Baltimore & O. R. R. Co.*, 19 D. C. 513; *Baltimore & O. R. R. Co. v. Fitzgerald*, 2 App. Cas. D. C. 501; *Owensborough etc. R. R. Co. v. Sutton (Ky.)*, 13 S. W. Rep.

switch track to its barns and occupy for a short distance for that purpose a street not named in its grant.<sup>98</sup> Where two companies have a franchise on the same street each should locate with due regard to the rights of the other and so as to best accommodate the public.<sup>99</sup> The rights of the company are at all times subject to reasonable regulation by the municipality.<sup>1</sup>

117a. The doctrine of an unreasonable or excessive use of streets by railroads, as a basis for compensation.—Some of the States which hold that railroads of all kinds are legitimate street uses, have sought to avoid the harsh consequences of this doctrine by introducing the qualification, that for any unreasonable or excessive use of the street the abutter may have compensation. Thus in a recent Kentucky case it is said: "The design of a railroad is to facilitate travel. It, therefore, subserves the object of a street dedication instead of destroying it. It may, therefore, under legislative sanction, have a joint occupancy of a street with other modes of travel having the same end in view; but it cannot occupy or use it to the unreasonable exclusion or obstruction of such other modes. The limitation upon the

1086; *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148; *Iron Mt. R. R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. Rep. 705; *Baugh v. Texas & N. O. R. R. Co.*, 80 Tex. 56, 15 S. W. Rep. 587. See also the following sections. In *Baltimore etc. R. R. Co. v. Fitzgerald*, 2 App. Cas. D. C. 501, the court says: "What the legislative power has given to the company is simply the right which individuals have by the common law, the right of transit over certain streets of the city—substantially that and nothing more. Individuals, in their use of the right of transit, may not convert the streets into freight yards, or into places of storage for their wagons, or into stables for their

horses. When the right of transit is given to a railroad company, why should it be construed to mean any more than it does in the case of an individual, due regard being had to the different instrumentalities used?"

<sup>98</sup> *Brooklyn Heights R. R. Co. v. Brooklyn*, 152 N. Y. 244, 46 N. E. Rep. 509.

<sup>99</sup> *General Electric R. R. Co. v. Chicago City R. R. Co.*, 66 Ills. App. 362.

<sup>1</sup> *Allen v. Jersey City*, 53 N. J. L. 522, 22 Atl. Rep. 257; *Baltimore v. Baltimore T. & G. Co.*, 166 U. S. 673, 17 S. C. Rep. 696. And see *Pittsburgh etc. R. R. Co. v. Chicago* 159 Ill. 369, 42 N. E. Rep. 781; *Burlington v. Burlington St. R. R. Co.*, 49 Ia. 144.

public right is that the appropriation of the street must not be inconsistent with the end for which it was established." And again: "It follows that the construction of a railroad along a public street is not, per se, an encroachment upon the individual right of the abutting lot-owner, and whether he can complain depends not upon the fact of its existence, but the manner of its construction and operation. If he is thereby deprived of its reasonable use, he may appeal to the courts for relief; but if he is merely inconvenienced thereby, or suffers some remote consequential injury, it is *damnum absque injuria*." And in a subsequent part of the opinion the court indicates what might be regarded as an unreasonable use. "Undoubtedly, if the structure shall be so located as to unreasonably obstruct the abutting lot-owner's means of egress and ingress from and to his lot; or, if he suffers substantial injury by having smoke, sparks or cinders thrown into his house; or its walls be cracked by the movement of heavy trains, he would be entitled to recover for the damages directly resulting from such causes."<sup>2</sup> There are a number of cases in other States which give more or less of support to this doctrine.<sup>3</sup> The

<sup>2</sup> *Fulton v. Short Route Trans. Co.*, 85 Ky. 640, 652-655, 4 S. W. Rep. 332. See also *Louisville & N. R. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. Rep. 8; *Commonwealth v. City of Frankfort*, 92 Ky. 149, 17 S. W. Rep. 287; *Kentucky v. I. Bridge Co. v. Kreiger*, 93 Ky. 243, 19 S. W. Rep. 738; *Strickley v. Chesapeake & O. R. R. Co.*, 93 Ky. 323, 20 S. W. Rep. 261; *Chesapeake & O. R. R. Co. v. Kobs* (Ky.), 30 S. W. Rep. 6; *Maysville & B. S. R. R. Co. v. Ingram* (Ky.), 30 S. W. Rep. 8; *Maysville etc. R. R. Co. v. Conner* (Ky.), 29 S. W. 344.

<sup>3</sup> In Kansas, while it is the general doctrine that the abutter cannot recover for the ordinary inconveniences occasioned

by a commercial railroad in a street, yet he may recover, if there is such a practical obstruction of the street in front of his lots as to amount to a denial of access. *Kansas etc. R. R. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051; *Wichita etc. R. R. Co. v. Smith*, 45 Kan. 264, 25 Pac. Rep. 623; *Atchison etc. R. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. Rep. 787. The court appears to rule, as matter of law, that where there is ample room between the sidewalk and the railroad for the passage of vehicles, there can be no recovery. *Kansas etc. R. R. Co. v. Cuykendall*, 42 Kans. 234, 21 Pac. Rep. 1051; *Kansas etc. R. R. Co. v. Mahler*, 45 Kans. 565, 26 Pac.



doctrine is not confined to commercial railroads, but has

Rep. 22; Wichita etc. R. R. Co. v. Smith, 45 Kans. 264, 25 Pac. Rep. 623; Herndon v. Kansas etc. R. R. Co., 46 Kans. 560, 26 Pac. Rep. 959. See also Ottawa etc. R. R. Co. v. Larson, 40 Kans. 301, 19 Pac. Rep. 661; Central Branch U. P. R. R. Co. v. Andrews, 41 Kans. 370, 21 Pac. Rep. 276; Kansas etc. R. R. Co. v. McAfee, 42 Kan. 239, 21 Pac. Rep. 1052; Chicago etc. R. R. Co. v. Union Inv. Co., 51 Kan. 600, 33 Pac. Rep. 378. In Missouri the doctrine that a commercial railroad, laid at the grade of a street, is a legitimate use of the street, has long been established, but late cases have introduced the qualification that if the street is so narrow that the running of trains excludes ordinary traffic for the time being, or if the road is laid on one side or over the sidewalk, so as to be especially injurious to abutting property, the abutting owners may enjoin its construction or operation. Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. Rep. 698; Knapp, Stout & Co. v. St. Louis Trans. Co., 126 Mo. 26, 28 S. W. Rep. 627; Schulenburg & B. L. Co. v. St. Louis etc. R. R. Co., 129 Mo. 455; 31 S. W. Rep. 796; Brown v. Chicago etc. R. R. Co., 137 Mo. 529; Watson v. Robertson Ave. R. R. Co., 69 Mo. App. 548; Sherlock v. Kansas City Belt R. R. Co., 142 Mo. 172; Corby v. Chicago etc. R. R. Co., 150 Mo. 457. In the first of these cases the court says: "Beginning with Lackland v. Railroad Co.; 31 Mo. 183, this court

has uniformly held that laying a track on the established grade of a street, under legislative authority, and operating a steam railway thereon, was not subjecting the street to a public use different from that contemplated in the original grant. This proposition was most ably and strenuously attacked in Gaus & Sons Manuf. Co. v. St. Louis etc. Ry. Co., 113 Mo. 308; 20 S. W. Rep. 658, but we felt constrained by the unbroken line of decisions to adhere to it. Porter v. Railroad Co., 33 Mo. 128; Cross v. Railway Co., 77 Mo. 321; Smith v. Railroad Co., 93 Mo. 24; 11 S. W. Rep. 259; Kansas City, St. J. & C. B. R. R. Co. v. St. Joseph T. R. R. Co., 97 Mo. 469; 10 S. W. Rep. 326; Rude v. City of St. Louis, 93 Mo. 408, 6 S. W. Rep. 257. This proposition unqualifiedly leads to this conclusion: A city may authorize a steam railroad to occupy a street with its tracks, and operate its trains over it. The abutting proprietors cannot recover damages for the injury resulting to their property, although it is subject to smoke, noise and cinders at all hours of day and night, and all ingress and egress for the legitimate purposes of business cut off, except at such times as the railroad may elect not to run trains upon it. Debarred from redress in that direction, they apply to a court of equity to restrain what they conceive is a public and private nuisance, and ask for protection of their own right to use the street as abut-

ting owners, and are met with the assertion that what the law itself licenses cannot be a nuisance, and that they must submit to whatever inconvenience ensues, because they might have anticipated that the street would be subjected to this servitude when they purchased their property. If these propositions are true, then it results that an abutting property owner on a street may have his property damaged or destroyed without redress, notwithstanding the constitutional guaranty 'that private property shall not be taken or damaged for public use without just compensation.' Const. art. 2, § 21. But, while it has been said that a city might authorize a railroad company to lay its tracks in its streets, it also has been determined by this court and many others that the city could not, in the exercise of its power, create a nuisance in the streets, or devote them, or any part of them, to a purpose inconsistent with the rights of the public or abutting property owners. Thus, in *Dubach v. Railroad Co.*, 89 Mo. 483; 1 S. W. Rep. 86, Judge Henry, speaking for the whole court, said: 'If the character of a street should be such that defendant's track could not be laid upon the street without hindering the public from using it, then, no matter how important to the company that its track should be laid in that street, it could not be done.' 'Nor is it competent for a city to authorize such use of a street dedicated as a street as will destroy it as a thoroughfare for the

public use.' In this case it is too plain to be evaded that the grant conferred by this ordinance practically creates a monopoly in defendant in the use of this street. \* \* \* Every time the defendant uses this street with its trains it absolutely deprives all teamsters of ordinary freight wagons access to this street, and, as the ordinance gives defendant the privilege of using it with its trains as often as it pleases, such use is utterly incompatible with the purposes for which this street was created, and is unreasonable. The municipal assembly had no right to appropriate this street to defendant's use in this way. \* \* \* No case in this State is authority for such exclusive use of a highway, and, if it was, we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not the exclusive right to monopolize a public street, and shut out the public and other carriers. Holding, as we do, that this ordinance, in view of the facts developed, amounts to a practical condemnation of this portion of Collins street to the private and almost exclusive use of defendant, we think the injunction was properly granted by the Circuit Court, and plaintiffs had such an interest as would enable them to maintain the action." The following cases also may be referred to as being more or less in line with the foregoing, though some of them contain dicta only. *Newell v. Minneapolis etc. R. R. Co.*, 35 Minn. 112; *People v. Ft. Wayne*

been applied to street railroads also.<sup>4</sup> These cases, as it seems to the writer, are a virtual confession of error in holding railroads to be a legitimate street use. They illustrate, however, the tendency of courts to work out in one way or another, substantial justice to the property owner. The theory of the cases would seem to be that while a railroad is a proper street use and in line with the purposes for which streets are established, yet if it materially interferes with the abutting owner's rights or easements in the street, or interferes with the enjoyment of such rights and easements so as to produce a material impairment of the property, then the abutter is entitled to compensation. The question turns upon the effect of the railroad on the abutting property. There does not seem to be any criterion to measure this effect but a pecuniary one. If property is depreciated in value from any cause it is materially affected and it does not seem as though any distinction could be made between a large and a small depreciation. These cases, if thus interpreted, will, therefore, bring about the same result as those which hold that a railroad is not a legitimate street use, for in the latter class of cases there can be no recovery, if there is no diminution in value.<sup>5</sup>

In a recent Kentucky case, at the suit of an abutting owner, a decree was entered, limiting a railroad company, which had authority to occupy a street, to a single track laid in the middle of the street and also restricting the number of freight trains which might be operated during business hours. On appeal the decree was sustained as to the former part and reversed as to the latter, thus holding

& E. R. R. Co., 92 Mich. 522, 52 N. W. Rep. 1010; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; Jackson v. Chicago etc. R. R. Co., 41 Fed. Rep. 656; State v. Trenton Pass. R. R. Co., 58 N. J. L. 666, 34 Atl. Rep. 1090.

<sup>4</sup> McQuaid v. Portland & V. R. R. Co., 18 Or. 237, 22 Pac. Rep.

899, 1 Am. R. R. & Corp. Rep. 34; Paquet v. Mt. Taber St. R. R. Co., 18 Or. 233, 22 Pac. Rep. 906; Dooley Block v. Salt Lake Rapid Transp. Co., 9 Utah, 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327; Smith v. East End St. R. R. Co., 87 Tenn. 626, 11 S. W. Rep. 709.

<sup>5</sup> Post, § 503d.

that a court of equity cannot, in advance, restrict a company as to the use of its tracks.<sup>6</sup>

§ 117b. Railroads in streets constructed without authority, or used in a way not authorized—Remedies of abutters. —A railroad in a street may be unauthorized because constructed without any color of authority whatever, or because constructed under an apparent authority which is void for any reason,<sup>7</sup> or has expired,<sup>8</sup> or because constructed in a manner or location not within the authority granted.<sup>9</sup> In all such cases the railroad is a public nuisance<sup>10</sup> and the abutter is entitled to the same remedies as in any other similar case of public nuisance in the streets.<sup>11</sup> If the

<sup>6</sup> Kentucky & I. Bridge Co. v. Kreiger, 93 Ky. 243, 19 S. W. Rep. 738.

<sup>7</sup> Daly v. Georgia etc. R. R. Co., 80 Ga. 793; Georgia etc. R. R. Co. v. Harvey, 84 Ga. 372, 10 S. E. Rep. 971; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. Rep. 287; Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. Rep. 698; Schulenberg etc. Co. v. St. Louis etc. R. R. Co., 129 Mo. 455, 31 S. W. Rep. 796; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. Rep. 553; Thomas v. Inter-County St. R. R. Co., 167 Pa. St. 120, 31 Atl. Rep. 426; Stevenson v. Mo. Pac. R. R. Co. (Mo.), 31 S. W. Rep. 793.

<sup>8</sup> Atchison St. R. R. Co. v. Nave, 38 Kan. 744, 17 Pac. Rep. 587.

<sup>9</sup> Louisville & N. R. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. Rep. 604; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; Village of Wayzata v. Great Northern R. R. Co., 50 Minn. 438, 52 N. W. Rep. 913; Knapp, Stout & Co. v. St. Louis Transfer R. R. Co., 126 Mo. 26, 28 S. W. Rep. 627; Thompson

v. Pennsylvania R. R. Co., 51 N. J. L. 42, 15 Atl. Rep. 833; Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433, 21 N. E. Rep. 1002; Matlage v. New York El. R. R. Co., 67 How. Pr. 232, 14 Daly 1; Galveston Wharf. Co. v. Gulf etc. R. R. Co., 81 Tex. 494, 17 S. W. Rep. 57; Dooley Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327.

<sup>10</sup> Kavanagh v. Mobile etc. R. R. Co., 78 Ga. 271; Glaesner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420; Van Horne v. Newark Pass. R. R. Co., 48 N. J. Eq. 332, 21 Atl. Rep. 1034; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. Rep. 553; Thomas v. Inter-County St. R. R. Co., 167 Pa. St. 120, 31 Atl. Rep. 476; Watkin v. West Phila. Pass. R. R. Co., 1 Pa. Dist. Ct. 463; Haines v. 22d St. etc. R. R. Co., 1 Pa. Dist. Ct. 506; City of Moundsville v. Ohio R. R. Co., 37 W. Va. 92, 16 S. E. Rep. 514; Hetzel v. B. & O. R. R. Co., 169 U. S. 26.

<sup>11</sup> Morris & Essex R. R. Co. v.

abutting owner has the fee, he is entitled to the same rights and remedies as though the public easement did not exist, and may maintain trespass,<sup>12</sup> ejectment<sup>13</sup> or bill for injunction.<sup>14</sup> If the fee is in the public, as both title and possession would be in a third party, the only remedy of the abutting owner is an action on the case, or a bill for injunction.<sup>15</sup> But a bill cannot be maintained for that purpose by one who does not own property upon the street, though he be a tax-payer.<sup>16</sup> If the abutter does not own the fee he must show some special damages in order to be entitled to an action,<sup>17</sup> but this may consist in the diminu-

Newark, 10 N. J. Eq. 352; *Parrot v. Cincinnati etc. R. R. Co.*, 3 Ohio St. 330; *Cooper v. Alden*, Harr. Mich. 72; *Garnett v. Jacksonville etc. R. R. Co.*, 20 Fla. 889; *Knickerbocker Ice Co. v. Philadelphia & Reading R. R. Co.*, 15 Phila. 48; *Hopkins v. Calasauqua Mfg. Co.*, 180 Pa. St. 199, 36 Atl. Rep. 735; *Patton v. Olympia D. & L. Co.*, 15 Wash. 210, 46 Pac. Rep. 237; *Baltimore etc. R. R. Co. v. Taylor*, 6 App. Cas. D. C. 259.

<sup>12</sup> *Morrell v. Chicago etc. R. R. Co.*, 49 Minn. 526, 52 N. W. Rep. 140; *Florida Southern R. R. Co. v. Brown*, 23 Fla. 104; *Jacksonville etc. R. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. Rep. 327; Post, § 649, and, generally, as to remedies in such cases, see post, chap. xxviii.

<sup>13</sup> *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655. Contra: *Edwardsville R. R. Co. v. Sawyer*, 92 Ills. 377. See post, § 646.

<sup>14</sup> *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Henderson v. New York Central R.*

*R. Co.*, 78 N. Y. 423; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Ford v. Chicago & N. W. Ry. Co.*, 14 Wis. 609; *Wright v. Syracuse etc. R. R. Co.*, 92 Hun 32, 36 N. Y. Supp. 901; *Thomas v. Inter-County St. R. R. Co.*, 167 Pa. St. 120, 31 Atl. Rep. 476; post, § 635.

<sup>15</sup> *Atchison St. R. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. Rep. 587; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327; *Hart v. Buchner*, 54 Fed. Rep. 925.

<sup>16</sup> *Davis v. New York*, 14 N. Y. 506.

<sup>17</sup> *Jacksonville etc. R. R. Co. v. Thompson*, 34 Fla. 346, 16 So. Rep. 282; *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271; *East Tennessee etc. R. R. Co. v. Boardman*, 96 Ga. 356, 23 S. E. Rep. 403; *Atchison St. R. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. Rep. 587; *Van Horne v. Newark Pass. R. R. Co.*, 48 N. J. Eq. 332, 21 Atl. Rep. 1034; *Watkin v. W. Phila. Pass. R. R. Co.*, 1 Pa. Dist. Ct. 463; *Haines v. 22d St. etc. R. R. Co.*, 1 Pa. Dist. Ct. 506.

tion in the value of his property.<sup>18</sup> When the road is constructed in a negligent and improper manner,<sup>19</sup> or when it is so operated or used as to unnecessarily obstruct the street,<sup>20</sup> the company will be liable. The subject of remedies is elsewhere discussed.<sup>21</sup>

§ 118. **Railroad across street. — Right of abutter on street to compensation.** — A railroad cannot be laid across a highway without compensation to the owner of the fee.<sup>22</sup> Generally, the mode of crossing and the duties of the company in respect to the same are defined by statute. Crossings above or below grade are frequently made, requiring alteration in the surface of the street to make suitable approaches. For damages resulting from such lateral approaches, the right to recover depends upon principles already discussed in this chapter. Different States hold different doctrines. If the crossing above or below grade is

<sup>18</sup> See post, § 653e.

<sup>19</sup> *Cadle v. Muscatine Western R. R. Co.*, 44 Ia. 11; *Brewer v. Boston C. & F. R. R. Co.*, 113 Mass. 52; *Kansas etc. R. R. Co. v. McAfee*, 42 Kans. 239, 21 Pac. Rep. 1052; *Hepting v. New Orleans Pac. R. R. Co.*, 36 La. An. 898; *McQuaid v. Portland & V. R. R. Co.*, 18 Or. 237, 22 Pac. Rep. 899, 1 Am. R. R. & Corp. Rep. 34; *Paquet v. Mt. Tabor St. R. R. Co.*, 18 Or. 233, 22 Pac. Rep. 906; *Harman v. Louisville R. R. Co.*, 87 Tenn. 614, 11 S. W. Rep. 703; *Evans v. Chicago etc. R. R. Co.*, 86 Wis. 397, 57 N. W. Rep. 354.

<sup>20</sup> *Frith v. Dubuque*, 45 Ia. 406; *Atchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 552; and see *Green v. New York Centrai R. R. Co.*, 65 How. Pr. 154; *Neltzey v. Baltimore etc. R. R. Co.*, 5 Mackey, 34; *Gllick v. B. & O. R. R. Co.*, 19 D. C. 412; *Fitzgerald v. B. & O. R. R. Co.*, 19

D. C. 513; *Baltimore & P. R. R. Co. v. Fitzgerald*, 2 App. Cas. D. C. 501; *Owensborough etc. R. R. Co. v. Sutton (Ky.)*, 13 S. W. Rep. 1086; *Thompson v. Pennsylvania R. R. Co.*, 51 N. J. L. 42, 15 Atl. Rep. 833; *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148; *Smith v. East End St. R. R. Co.*, 87 Tenn. 626, 11 S. W. Rep. 709; *Iron Mt. R. R. Co. v. Bingham*, 87 Tenn. 522; *Baugh v. Texas & N. O. R. R. Co.*, 80 Tex. 56, 15 S. W. Rep. 587; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146; *Mt. Auburn Cable R. R. Co. v. Neare*, 54 Ohio St. 153, 42 N. E. Rep. 768; *State v. Trenton Pass. R. R. Co.*, 58 N. J. L. 666, 34 Atl. Rep. 1090; *Stevenson v. Mo. Pac. R. R. Co. (Mo.)*, 31 S. W. Rep. 793.

<sup>21</sup> Chaps. 27 and 28.

<sup>22</sup> *Trustees v. Auburn & Rochester R. R. Co.*, 3 Hill 567; *Starr v. Camden etc. R. R. Co.*, 24 N. J. L. 592.

wholly unnecessary, the company will be liable for damages caused by the lateral approaches.<sup>23</sup> As such changes of grade are made solely to accommodate the railroad company, and not at all for the purpose of improving the highway for travel, being always, in fact, a detriment to the highway as such, the abutting owners should receive compensation for any injury to their rights in the street as already defined, as by interfering with access or light and air, as well as for actual invasion of their lots, as by turning surface water onto them or otherwise. Some courts have allowed a recovery for such damages,<sup>24</sup> and others have denied it.<sup>25</sup> Damages to abutting property by the construction of viaducts or bridges over railroads, and by the approaches to such viaducts or bridges, are considered

<sup>23</sup> Louisville & Nashville R. R. Co. v. Hodge, 6 Bush, 141; Far-rant v. First Division of St. Paul & Pac. Ry. Co., 13 Minn. 311. The company may make necessary alterations; Commonwealth v. Hartford & New Haven R. R. Co., 14 Gray, 379.

<sup>24</sup> Buchner v. C. M. & N. W. Ry. Co., 56 Wis. 403; Buchner v. Chicago, Mil. & St. Paul Ry. Co., 60 Wis. 264; Indianapolis etc. R. R. Co. v. Smith, 52 Ind. 428; Kaiser v. St. Paul S. & T. F. R. R. Co., 22 Minn. 149; Nicholson v. New York & New Haven R. R. Co., 22 Conn. 74; Longworth v. Meriden & W. R. R. Co., 61 Conn. 451, 23 Atl. Rep. 827; Egbert v. Lake Shore etc. R. R. Co., 6 Ind. App. 350, 33 N. E. Rep. 659; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. Rep. 288, 38 N. E. Rep. 421; Hitchcock v. Chicago etc. R. R. Co., 88 Iowa, 242, 55 N. W. Rep. 337; Louisville & N. R. R. Co. v. Finley, 86 Ky. 294, 5 S. W. Rep. 753; McNulta v. Ralston, 5

Ohio C. C. 330; Shealy v. Chicago etc. R. R. Co., 77 Wis. 653, 46 N. W. Rep. 887; West v. Parkdale, 8 Ont. 59; West v. Parkdale, 7 Ont. 270; Alabama M. R. R. Co. v. Williams, 92 Ala. 277, 9 So. Rep. 203; Egbert v. Lake Shore & M. S. R. R. Co., 6 Ind. App. 350, 33 N. E. Rep. 659; Pennsylvania R. R. Co. v. Stanley, 10 Ind. App. 421, 37 N. E. Rep. 288, 38 N. E. Rep. 421; Wead v. St. Johnsbury & L. C. R. R. Co., 64 Vt. 52, 24 Atl. Rep. 361; Shealy v. Chicago etc. R. R. Co., 72 Wis. 471, 40 N. W. Rep. 145.

<sup>25</sup> Whittier v. Portland & Kennebec R. R. Co., 38 Me. 26; Towle v. Eastern Railroad, 17 N. H. 519; Buck v. Conn. & Pass. River R. R. Co., 42 Vt. 370; Richardson v. Vermont Central R. R. Co. 25 Vt. 465; Uline v. New York Cent. R. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536; Conklin v. New York, Ontario & Western Ry. Co., 102 N. Y. 107; Nottingham v. B. & P. R. R. Co., 3 McArthur 517; Franz v. Sioux City etc. R.

in another section.<sup>26</sup> Where a railroad crosses a cul de sac, and so interferes with the access to property thereon, a recovery may be had, although the surface of the street is not interfered with.<sup>27</sup> But where a street is crossed by a cut two blocks away from the plaintiff's property, he cannot recover as his right of access or outlet is not interfered with.<sup>28</sup> Where a street was crossed seventy-one feet from the plaintiff's property and blocked up at that point, so as to leave plaintiff on a cul de sac, he was held entitled to recover damages.<sup>29</sup> So where one end of an alley was blockaded, so as to interfere with access to the rear of plaintiff's lot.<sup>30</sup>

The duty of a railroad company to restore a highway crossed is a continuing one, and where it crosses by a bridge, it must be replaced when necessary.<sup>31</sup> Authority to cross any highway in the line of the railway does not

R. Co., 55 Ia. 107; Atchison etc. R. R. Co. v. Arnold, 52 Kan. 729, 35 Pac. Rep. 780; Atchison etc. R. R. Co. v. Luening, 52 Kan. 732, 35 Pac. Rep. 801; Ottenot v. New York etc. R. R. Co., 119 N. Y. 603, 23 N. E. Rep. 169; Rauenstein v. New York etc. R. R. Co., 136 N. Y. 528, 32 N. E. Rep. 528, 7 Am. R. R. & Corp. Rep. 520; S. C. 120 N. Y. 661, 24 N. E. Rep. 1020.

<sup>26</sup> Post, § 121e.

<sup>27</sup> Brakken v. Minneapolis etc. R. R. Co., 29 Minn. 41; Hayes v. Chicago etc. R. R. Co., 46 Minn. 349, 49 N. W. Rep. 61; Harvey v. Georgia Southern etc. R. R. Co., 90 Ga. 66, 15 S. E. Rep. 783.

<sup>28</sup> Shaubut v. St. Paul & Sioux City R. R. Co., 21 Minn. 502; and see Brakken v. Minneapolis & St. Louis Ry. Co., 32 Minn. 425; S. C. 31 Minn. 45, and 29 Minn. 41; also Rochette v. Chicago, Mil. & St. Paul Ry. Co., 32 Minn. 201; Barnum v. Minnesota Transfer

Co., 33 Minn. 365; Lakkie v. Chicago etc. R. R. Co., 44 Minn. 438, 46 N. W. Rep. 912; but see Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420.

<sup>29</sup> Johnsen v. Old Colony R. R. Co., 18 R. I. 642, 29 Atl. Rep. 591. But see O'Connor v. St. Louis etc. R. R. Co., 56 Ia. 735.

<sup>30</sup> Harvey v. Georgia So. R. R. Co., 90 Ga. 66, 15 S. E. Rep. 783; Pennsylvania R. R. Co. v. Stanley, 10 Ind. App. 421, 37 N. E. Rep. 288, 38 N. E. Rep. 421; Kaji v. Chicago etc. R. R. Co., 57 Minn. 422, 59 N. W. Rep. 493; Leavenworth etc. R. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. Rep. 297.

<sup>31</sup> Chesapeake etc. R. R. Co. v. Dyer County, 87 Tenn. 712, 11 S. W. Rep. 943, and see Henry v. Wabash Western R. R. Co., 44 Mo. App. 100.



authorize a track on a curve, which does not cross the highway but begins a branch road.<sup>32</sup>

§ 119. **Right of municipality having the fee of street to receive compensation.**—As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public.<sup>33</sup> It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.<sup>34</sup> The same rule applies to street railroads as to commercial railroads.<sup>35</sup> So as to a public bridge.<sup>36</sup> But where a railroad company made an exclusive appropriation of a part of a public highway including a bridge, and tore down the bridge and used the materials, it was held that the town could recover therefor,<sup>37</sup> being put in this respect upon the same footing as a turnpike company. And where a railroad was so constructed as to destroy a portion of a county road, it was held that the county could maintain an action for damages.<sup>38</sup> A municipality may enjoin the construction of a railroad upon a street without authority,<sup>39</sup> and when a railroad or any of its appurtenances is unlawfully upon a street, it can maintain an action for its removal.<sup>40</sup>

<sup>32</sup> Bangor etc. R. R. Co. v. Smith, 47 Me. 34.

<sup>33</sup> Ante, § 91k.

<sup>34</sup> Milwaukee v. Milwaukee & Beloit R. R. Co., 7 Wis. 85; Clinton v. Cedar Rapids & Mo. River R. R. Co., 24 Ia. 455; Chicago etc. R. R. Co. v. Newton, 36 Ia. 299; Savannah & Thunderbolt R. R. Co. v. Savannah, 45 Ga. 602; People v. Kerr, 27 N. Y. 188; contra: Donnakker v. State, 8 S. & M. 649.

<sup>35</sup> Clinton v. Clinton & Lyons H. Ry. Co., 37 Ia. 61; Savannah & Thunderbolt R. R. Co. v. Savannah, 45 Ga. 602; People v. Kerr, 27 N. Y. 188.

<sup>36</sup> County of Floyd v. Rome St.

R. R. Co., 77 Ga. 614.

<sup>37</sup> Troy v. Cheshire R. R. Co., 23 N. H. 83.

<sup>38</sup> Louisville & N. R. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. Rep. 604.

<sup>39</sup> Stamford v. Stamford H. R. Co., 56 Conn. 381; Brunswick & W. R. R. Co. v. City of Waycross, 88 Ga. 68, 13 S. E. Rep. 835; City of Philadelphia v. Phila. etc. R. R. Co., 19 Phil. 507; Williamsport v. Williamsport Pass. R. R. Co., 3 Pa. Co. Ct. 39; Philadelphia v. Phila. etc. R. R. Co., 7 Pa. Co. Ct. 390. But see Supervisors v. Sea View R. R. Co., 23 Hun 180.

<sup>40</sup> Rio Grande R. R. Co. v.

§ 120. When the owner is estopped from claiming damages.—Where the owner of property urges or induces a railroad company to locate its road upon the adjacent street, he will, after the invitation has been acted upon, be estopped from claiming damages or enjoining the operation of the road.<sup>41</sup> It has been held that lawful authority to occupy a street will be presumed after the lapse of twenty years.<sup>42</sup>

§ 121. Measure of damages: Remedies.—A discussion of the proper measure of damages and of the elements which may properly be considered in all cases where a recovery may be had for injuries by a railroad laid in a public street, together with a consideration of the proper remedies to be resorted to in such cases, are reserved for a subsequent part of this treatise, to which the reader is referred.<sup>43</sup>

§ 121a. Where there is a change of grade in connection with the construction of a railroad in a street.—It has already been shown that damages occasioned by a change of grade for the purpose of improving a street as a highway are not a taking within the constitution.<sup>44</sup> We have

Brownsville, 45 Tex. 88; *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Village of Wyzata v. Great Northern R. R. Co.*, 50 Minn. 438, 52 N. W. Rep. 913; *City of St. Louis v. Mo. Pac. R. R. Co.*, 114 Mo. 13, 21 S. W. Rep. 202.

<sup>41</sup> *Wolf v. Covington & Lexington R. R. Co.*, 15 B. Mon. 404; *Miller v. Railroad Co.*, 6 Hill 61; *Murdock v. Prospect Park & Coney Island R. R. Co.*, 10 Hun 598; *Joyce v. East St. Louis El. St. R. R. Co.*, 43 Ills. App. 157; *Burkham v. Ohio & M. R. R. Co.*, 122 Ind. 344, 23 N. E. Rep. 799; *Union Barb Wire Co. v. Chicago etc. R. R. Co.*, 79 Ia. 614, 44 N. W. Rep. 900. See further post § 508.

<sup>42</sup> *Higbee v. Camden & Amboy*

*R. R. Co.*, 20 N. J. Eq. 435; *Morris & Essex R. R. Co. v. Prudden*, 20 N. J. Eq. 530.

<sup>43</sup> Measure of Damages, post, § 493. A few of the leading cases are here cited. *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423. As to the apportionment of damages where only part of the track is on the land of the abutting owner, see *Blesch v. C. & N. W. Ry. Co.*, 48 Wis. 168; *S. C. 43 Wis. 183*; *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366. Remedies, post, chapters xxvii and xxviii.

<sup>44</sup> Ante, §§ 96, 100a.

also endeavored to show that if the grade is changed for any other purpose than to improve the street for passage, any injury to the abutting property caused thereby will amount to a taking.<sup>45</sup> Ordinarily when a railroad is laid in a street it is required to conform to the grade of the street. If a grade has been established and the street has never been brought to the grade so established, a railroad will not be liable to abutters for merely bringing the street to grade in order to lay its tracks at the grade established.<sup>46</sup> But sometimes the grade is changed, not for the purpose of facilitating ordinary traffic, but of accommodating the tracks of a railroad company. According to the better reason, as we conceive it, the abutter in such case is entitled to recover for any damage to his property caused by the change. The authorities, however, are conflicting and, perhaps, on the whole, do not favor a recovery.<sup>47</sup> Where

<sup>45</sup> Ante, §§ 100, 100a, 100b.

<sup>46</sup> Interstate Consol. R. T. R. Co. v. Early, 46 Kan. 197, 26 Pac. Rep. 422. Contra: *Stritesky v. Cedar Rapids*, 98 Ia. 373, 67 N. W. Rep. 271.

<sup>47</sup> The following are opposed to a recovery on the ground of a taking. *Protzman v. Indianapolis etc. R. R. Co.*, 9 Ind. 467; *Weir v. Owensboro & N. R. R. Co. (Ky.)*, 21 S. W. Rep. 643; *Briggs v. Lewiston etc. R. R. Co.*, 79 Me. 363; *O'Brien v. Baltimore Belt R. R. Co.*, 74 Md. 363, 22 Atl. Rep. 141; *Garrett v. Lake Roland El. R. R. Co.*, 79 Md. 277, 29 Atl. Rep. 830, 10 Am. R. R. & Corp. Rep. 39; *Corey v. Buffalo etc. R. R. Co.*, 23 Barb. 482; *County of Chester v. Brewer*, 117 Pa. St. 647, 12 Atl. Rep. 577. And see *Green v. City & Suburban R. R. Co.*, 78 Md. 294, 28 Atl. Rep. 626.

The following cases favor a re-

covery: *Chicago etc. R. R. Co. v. Elsert*, 127 Ind. 156, 26 N. E. Rep. 759; *Atchison & C. R. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. Rep. 787; *Nichols v. Ann Arbor etc. R. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538; *Tate v. M. K. & T. R. R. Co.*, 64 Mo. 149; *Egerer v. New York Cent., etc., R. R. Co.*, 130 N. Y. 108, 29 N. E. Rep. 95, 5 Am. R. R. & Corp. Rep. 241; *Reining v. New York, etc., R. R. Co.*, 128 N. Y. 157, 28 N. E. Rep. 640, 5 Am. R. R. & Corp. Rep. 476; *Coatsworth v. Lehigh Val. R. R. Co.*, 156 N. Y. 451; *Zehren v. Milwaukee Elec. R. R. Co.*, 99 Wis. 83.

The following cases, involving the right to recover in such cases, arose under constitutions or statutes giving compensation for property damaged or injured as well as for property taken: *Alabama M. R. R. Co. v. Coskry*, 92 Ala. 254, 9 So. Rep. 202; *Es-*

the grade of tracks is changed for the benefit of the highway, there can be no recovery.<sup>48</sup>

§ 121b. **Compensation for additional track.**—In Indiana it has been held that when a railroad company locates its road upon a public street, the fee of which is in the abutting owners, and damages are assessed and paid in the usual way, the company will acquire the right to lay down as many tracks as its business may require, and that such right can be exercised from time to time as the business of the company increases.<sup>49</sup> According to this view, a rail-

lich v. Mason City etc. R. R. Co., 75 Ia. 443, 39 N. W. Rep. 700; Taylor v. Bay City St. R. R. Co., 101 Mich. 140, 59 N. W. Rep. 447; Sheehy v. Kansas City Cable R. R. Co., 94 Mo. 574, 7 S. W. Rep. 579; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. Rep. 259; Brady v. Kansas City Cable R. R. Co., 111 Mo. 329, 19 S. W. Rep. 953; Spencer v. Met. St. R. R. Co., 58 Mo. App. 513; Nebraska etc. R. R. Co. v. Scott, 31 Neb. 571, 48 N. W. Rep. 390; County of Chester v. Brewer, 117 Pa. St. 647, 12 Alt. Rep. 577; Baltimore etc. R. R. Co. v. Duke, 129 Pa. St. 422, 18 Alt. Rep. 566; Westheffer v. Lebanon & A. St. R. R. Co., 163 Pa. St. 54, 29 Alt. Rep. 873; Hatch v. Tacoma etc. R. R. Co., 6 Wash. 1, 32 Pac. Rep. 1063; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac. Rep. 137; Arbenz v. Wheeling etc. R. R. Co., 33 W. Va. 1, 10 S. E. Rep. 14; Fred v. Kansas City Cable R. R. Co., 65 Mo. App. 121. See also Jacksonville etc. R. R. Co. v. Thompson, 34 Fla. 346, 16 So. Rep. 282; Kansas etc. R. R. Co. v. Cuykendall, 42 Kan. 234, 21 Pac. Rep. 1051; Witt v. St. Paul & N. P.

R. R. Co., 38 Minn. 122, 35 N. W. Rep. 862; Iron Mt. R. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; Trustees First Cong. Church v. Milwaukee etc. R. R. Co., 77 Wis. 158, 45 N. W. Rep. 1086; Jackson v. Chicago etc. R. R. Co., 41 Fed. Rep. 656; Hendrie v. Toronto etc. R. R. Co., 26 Ontario, 667; Jarboe v. Carrollton, 73 Mo. App. 347; Hulett v. Missouri etc. R. R. Co., 80 Mo. App. 87.

<sup>48</sup> Welde v. New York etc. R. R. Co., 28 N. Y. App. Div. 379.

<sup>49</sup> White v. Chicago etc. R. R. Co., 122 Ind. 317, 23 N. E. Rep. 782, 2 Am. R. R. & Corp. Rep. 138; Chicago etc. R. R. Co. v. Elsert, 127 Ind. 156, 26 N. E. Rep. 759. In the first of these cases the court says: "In appropriation of a right of way, or the location of a railroad along, upon and over a street or highway, the location and appropriation is made with a view of future use and occupancy by the railroad company to the full extent and purpose as the future operation and business of the company may demand. It gives to the company, as against the property owners affected there-

road company, by condemning a right of way through a street, would acquire the same rights in the street, at least as against abutting owners, as it would have in a right of way over private property. Certainly such a result ought not to be countenanced unless the statutes clearly compel it. When a railroad seeks to condemn a right of way in a street it can only acquire a right to the joint use of the street, and its application should describe exactly the extent of the right or joint use proposed to be acquired; in other words, the number of tracks to be laid down and their location, and how they are to be used.<sup>50</sup> This is the only way in which the rights of the railroad, the public and the abutting owners can be defined and the damages assessed upon an intelligent basis.<sup>51</sup> In most cases railroads are constructed in streets by virtue of a legislative or municipal grant of authority, and not by virtue of a condemnation. If the construction of the railroad is wrongful as against the abutting owner, he has his remedy for damages, but he can only recover for the damages actually sustained, and these must depend upon the use which has actually been made of the street. If, after damages have been assessed for the original entry, or after the same have been barred by the lapse of time, an additional track is laid, either under the original or a subsequent authority;

by, the right to use such right of way or street or highway, upon which the road is located, a full and complete right to use the same, for railroad purposes, in as full and ample a manner as the necessity of the company may demand."

<sup>50</sup> Post, §§ 350-352a.

<sup>51</sup> Philadelphia etc. R. R. Co. v. Berks County R. R. Co., 2 Woodward's Decs. (Pa. Supm.) 361; Pennsylvania S. V. R. R. Co. v. Philadelphia etc. R. R. Co., 157 Pa. St. 42, 27 Atl. Rep. 683; Jones v. Erie & W. V. R. R. Co., 169 Pa. St. 333, 32 Atl. Rep. 335.

In the last case the court says: "The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the breadth of 60 feet for its right of way, is only applicable where the entry is adverse, and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a public street, whether made under authority of the act of assembly incorporating the company, or by virtue of municipal consent."

there is a clear right to recover the damages thereby occasioned.<sup>52</sup>

§ 121c. **Street railroads crossing commercial railroads.**—The right of way which a steam railroad acquires across a street is subject to the easement of the public in the street and to the use of the street for all legitimate street purposes. A street railroad, being generally held to be a legitimate street use,<sup>53</sup> it follows that it may be laid across the tracks of a steam railroad, intersecting the street without compensation.<sup>54</sup> Of course the street railroad company

<sup>52</sup> *Denver & R. G. R. R. Co. v. Costes*, 1 Col. App. 336, 28 Pac. Rep. 1129; *McCarty v. C. B. & Q. R. R. Co.*, 34 Ill. App. 273; *Maltman v. Chicago etc. R. R. Co.*, 41 Ill. App. 229; *In re New York El. R. R. Co.*, 76 Hun. 384, 28 N. Y. Supp. 110; *Maitland v. Manhattan R. R. Co.*, 9 Misc. 616, 30 N. Y. Supp. 428; *C. C. & St. L. R. R. Co. v. Reeder*, 6 Ohio C. C. 354; *Northern Central R. R. Co. v. Holland*, 117 Pa. St. 613, 12 Atl. Rep. 575. And see *Ranson v. Citizens' R. R. Co.*, 104 Mo. 375, 16 S. W. Rep. 416; *Varwig v. Cleveland etc. R. R. Co.*, 6 Ohio C. C. 439; *Dilley v. Wilkes-Barre Pass. R. R. Co.*, 12 Pa. Co. Ct. 270; *Illinois Central R. R. Co. v. Davis*, 71 Ill. App. 99.

<sup>53</sup> Ante, § 115h.

<sup>54</sup> *Chicago etc. R. R. Co. v. Whiting etc. R. R. Co.*, 139 Ind. 297, 38 N. E. Rep. 604, 11 Am. R. R. & Corp. Rep. 507; *Chicago etc. R. R. Co. v. West Chicago St. R. R. Co.*, 156 Ill. 270, 40 N. E. Rep. 1008, 12 Am. R. R. & Corp. Rep. 522; *New York etc. R. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. Rep. 953; *Pittsburgh etc. R. R. Co. v.*

*West Chicago St. R. R. Co.*, 54 Ill. App. 273; *Elizabethtown etc. R. R. Co. v. Ashland & C. St. R. R. Co.*, 96 Ky. 347, 26 S. W. Rep. 181; *Morris etc. R. R. Co. v. Newark Pass. R. R. Co.*, 51 N. J. Eq. 379, 29 Atl. Rep. 184; *Buffalo etc. R. R. Co. v. Du Bois Traction Pass. R. R. Co.*, 149 Pa. St. 1, 24 Atl. Rep. 179; *Delaware etc. R. R. Co. v. Wilkes-Barre & W. S. R. R. Co.*, 1 Pa. Dist. Ct. 627; *Du Bois Traction Pass. R. R. Co. v. Buffalo etc. R. R. Co.*, 10 Pa. Co. Ct. 401. And see *Highland Ave. etc. R. R. Co. v. Birmingham Union R. R. Co.*, 93 Ala. 505, 9 So. Rep. 568; *Atchison St. R. R. Co. v. Mo. Pac. R. R. Co.*, 31 Kan. 660; *Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co.*, 97 Mo. 457, 10 S. W. Rep. 826; *Chicago etc. R. R. Co. v. Beatrice Rapid Transit & P. Co.*, 47 Neb. 741, 66 N. W. Rep. 830; *Buffalo etc. R. R. Co. v. New York etc. R. R. Co.*, 72 Hun 587, 25 N. Y. Supp. 265; *Chicago etc. R. R. Co. v. General Elec. R. R. Co.*, 79 Ill. App. 569; *Consolidated Traction Co. v. South Orange etc. R. R. Co.*, 56 N. J. Eq. 569, 40 Atl. Rep. 15; *Birming-*

must construct the crossing at its own expense and with as little injury to the other company as possible. Where a grade crossing of a steam railroad and street railroad is abolished by raising the tracks of the former, the work must be so done as to give sufficient head room for the cars of the street railroad company.<sup>55</sup>

§ 121d. **Railroads in streets.—Miscellaneous cases.**—The abutting owner has no easement in the street for backing up teams to the sidewalk for the purpose of loading and unloading freight, and the interference with such use of the street by laying a railroad therein affords no ground for an injunction or suit for damages.<sup>56</sup> When streets are dedicated by plat and the right is reserved to use them for railroad purposes, the reservation confers no greater right than an ordinary grant.<sup>57</sup> Where land is dedicated for a street, with a railroad thereon, the dedication is subject to the right of the railroad company.<sup>58</sup> Where lots are conveyed to a railroad company to be used for railroad purposes, it does not carry the right to use the street to the center line thereof for such purposes, to the damage of other property of the grantor.<sup>59</sup> The fact that a street has been mapped out through plaintiff's land does not give a railroad company any right to occupy it without compensation.<sup>60</sup> Where a boulevard was laid out under a special act of the legislature, with a provision that no railway or tramway should be constructed thereon without compensation to the owner of the fee, the same as though no highway existed, it was held the legislature could not abrogate this condition by

ham Traction Co. v. Birmingham R. R. & Elec. Co., 119 Ala. 129, 24 So. Rep. 303.

<sup>55</sup> Chicago General R. R. Co. v. Chicago etc. R. R. Co., 181 Ill. 605.

<sup>56</sup> Hobart v. Milwaukee City R. R. Co., 27 Wis. 194; Louisville Bagging Mfg. Co. v. Central Pass. R. R. Co., 95 Ky. 50, 23 S. W. Rep. 592; Taylor v. Bay City

St. R. R. Co., 101 Mich. 140, 59 N. W. Rep. 447.

<sup>57</sup> Ottawa etc. R. R. Co. v. Larson, 40 Kan. 301, 19 Pac. Rep. 661.

<sup>58</sup> City of Denver v. Denyer etc. R. R. Co., 17 Col. 583, 31 Pac. Rep. 338.

<sup>59</sup> Lamm v. Chicago etc. R. R. Co., 45 Minn. 71, 47 N. W. Rep. 455.

<sup>60</sup> Quigley v. Penn. S. V. R. R.

authorizing a railroad without compensation.<sup>61</sup> Where a railroad was built on the property of the company, adjoining a street or alley, and the filling encroached slightly thereon, it was held the owner opposite had no right of action.<sup>62</sup> An abutment or arch in a street for the use of a railroad, and authorized by municipal authority, is not a nuisance, which can be prevented or abated.<sup>63</sup> A telephone company may compel a railroad company subsequently occupying the street with trolley wires, to put up guard wires where it crosses the telephone line, the duty being enjoined by ordinance.<sup>64</sup> A consent of abutters to lay tracks in a street does not authorize any encroachment on their property, though the street is too narrow to accommodate their tracks.<sup>65</sup> An abutter can recover nothing for gate fixtures, erected on his fee pursuant to municipal authority or direction.<sup>66</sup> One railroad company may be prevented by injunction from wrongfully interfering with another company in laying its tracks in a street.<sup>67</sup> A city cannot authorize the construction of a railroad on a private street.<sup>68</sup> A city may impose reasonable regulations upon a railroad company as to the manner of laying its tracks, though its authority is derived directly from the legislature.<sup>69</sup> A railroad company, owning abutting property, is entitled to the

Co., 121 Pa. St. 35, 15 Atl. Rep. 478, S. C. 4 Mont. Co. L. Rep. 179.

<sup>61</sup> *Matter of Southern Boulevard R. R. Co.*, 58 Hun 497, 38 N. Y. St. 550, 12 N. Y. Supp. 466; appeal from same dismissed, 128 N. Y. 93.

<sup>62</sup> *Rinard v. Burlington & W. R. R. Co.*, 66 Ia. 440; *Morris v. Wisconsin Midland R. R. Co.*, 82 Wis. 541, 52 N. W. Rep. 758.

<sup>63</sup> *Chicago & N. W. R. R. Co. v. Elgin*, 91 Ill. 251; *Gates v. Kansas City etc. R. R. Co.*, 111 Mo. 28, 19 S. W. Rep. 957.

<sup>64</sup> *State v. Janesville St. R. R.*

Co., 87 Wis. 72, 57 N. W. Rep. 970.

<sup>65</sup> *Curtin v. Rochester R. R. Co.*, 78 Hun 555, 29 N. Y. Supp. 521.

<sup>66</sup> *Trustees First Cong. Church v. Milwaukee etc. R. R. Co.*, 77 Wis. 158, 45 N. W. Rep. 1086.

<sup>67</sup> *Chicago General R. R. Co. v. West Chicago St. R. R. Co.*, 63 Ill. App. 464; *Central Crosstown R. R. Co. v. Met. St. R. R. Co.*, 16 App. Div. N. Y. 229.

<sup>68</sup> *Talbot v. Richmond etc. R. R. Co.*, 31 Gratt. 685.

<sup>69</sup> *Harrisburg City Pass. R. R. Co. v. Harrisburg*, 7 Pa. Co. Ct.



same remedies as any other abutter.<sup>70</sup> Where a railroad had built an overhead crossing, it was held that a street railroad company could not use it without compensation.<sup>71</sup>

§ 121e. **Damage to railroads, water pipes, gas pipes, etc., by the grading and improvement of streets.**—The power to grade and change the grade of streets and otherwise improve them in aid of the right of passage is continuing and inalienable.<sup>72</sup> A grant of the right to lay down and operate a railroad in a street,<sup>73</sup> or to lay water or gas pipes therein<sup>74</sup> is subject to the paramount right of the public to grade and improve the street. It follows that the grantees of such privileges cannot recover for any damage to their property resulting from such improvements, when the same are executed with due care and skill. Accordingly, when the grade of a street is lowered and water or gas pipes are exposed or brought too near the surface, there is no remedy against the city either to prevent the change or recover damages therefor, but the company must lower its pipes at its own expense.<sup>74</sup> So when the grade was raised and the pipes were buried too deep.<sup>75</sup> A railroad company cannot prevent a change of grade, but may be compelled to change

584; *Same v. Same*, 7 Pa. Co. Ct. 593.

<sup>70</sup> *Pennsylvania S. V. R. R. Co. v. Reading Paper Mills*, 149 Pa. St. 18, 24 Atl. Rep. 205.

<sup>71</sup> *Carolina Central R. R. Co. v. Wilmington St. R. R. Co.*, 120 N. C. 520; *Pennsylvania R. R. Co. v. Greensburg etc. R. R. Co.*, 176 Pa. St. 559, 35 Atl. Rep. 122.

<sup>72</sup> *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810, 14 S. E. Rep. 665, 6 Am. R. R. & Corp. Rep. 88; *Ante* § 107.

<sup>73</sup> *Ridge Ave. Pass. R. R. Co. v. Philadelphia*, 10 Phil. 37; *Chicago, B. & Q. R. R. Co. v. City of Quincy*, 136 Ill. 563, 27 N. E. Rep. 192; *Ridge Ave. Pass. R. R. Co. v. Philadelphia*, 181 Pa. St. 592.

<sup>74</sup> *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810, 14 S. E. Rep. 665, 6 Am. R. R. & Corp. Rep. 88; *Columbus Gas Light & Coke Co. v. City of Columbus*, 50 Ohio St. 65, 33 N. E. Rep. 292, 7 Am. R. R. & Corp. Rep. 472; *Rockland Water Co. v. City of Rockland*, 83 Me. 267, 22 Atl. Rep. 166; *Stillwater Water Co. v. City of Stillwater*, 50 Minn. 498, 52 N. W. Rep. 893; *National W. Co. v. City of Kansas*, 20 Mo. App. 237; *In matter of Deering*, 93 N. Y. 361; *Southwark Water Co. v. District Board*, L. R. (1898) 2 Ch. 603.

<sup>75</sup> *Jamalca Pond Aqueduct Co. v. Brookline*, 121 Mass. 5.

the grade of its tracks to conform to a new grade of the street.<sup>76</sup> But this power of changing the grade of streets cannot be so exercised as to destroy the franchise of a railroad company lawfully authorized to occupy a street. A railroad was authorized to be built upon a street along the shore of Puget Sound, in Seattle, and to connect with the wharves along its route. The railroad and surrounding property were destroyed by fire. Thereupon the city raised the grade of intersecting streets so as to render it impossible for the railroad to be reconstructed without cutting through the embankments made by such changes of grade. In a suit by the city to enjoin such cutting, the bill was dismissed on the ground that the city's power to grade the streets must be so exercised as not to destroy the company's franchise.<sup>77</sup> Where a railroad crossed a street

<sup>76</sup> *McHale v. Easton & B. Transit Co.*, 169 Pa. St. 416, 32 Atl. Rep. 461; *City of Detroit v. Ft. Wayne etc. R. R. Co.*, 90 Mich. 646, 51 N. W. Rep. 688, 6 Am. R. R. & Corp. Rep. 188. But a contractor, paving a street, has no right unnecessarily to obstruct the operation of street cars, and may be prevented from so doing. *Milwaukee St. R. R. Co. v. Adlam*, 85 Wis. 142, 55 N. W. Rep. 181, 8 Am. R. R. & Corp. Rep. 320.

<sup>77</sup> *City of Seattle v. Columbia & P. S. R. R. Co.*, 6 Wash. 379, 33 Pac. Rep. 1048. The court says: "Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It

cannot be exercised to the extent of working the destruction of such a franchise previously granted. This would amount to an unauthorized taking of property, and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the right to change the grades of streets is sustained upon the ground that the same may be done consistently with the preservation of rights previously acquired by others. \* \* \* The property of railroad companies is as much within the protection of the law as that of any other company or of any individual. Railroads are recognized as essential to the welfare and prosperity of the people, and, because of their ca-

under an ordinance which required it to build a bridge so as to allow use of full width of street, and the city subsequently widened the street, it was held that the railroad company was entitled to compensation for having to reconstruct the bridge.<sup>78</sup> Where a railroad crosses a street by a bridge and is allowed to occupy a part of the street with piers, it may be compelled to remove them without compensation when the traffic on the street requires it.<sup>79</sup> Where a statute provided that any person damaged by altering a street should be entitled to compensation, it was held to apply to a water company whose pipes were damaged.<sup>80</sup>

§ 121f. **Damage to railroads, water and gas pipes by the construction of sewers.**—The construction of sewers differs from the grading of streets which was considered in the last section, in that the grading of a street ordinarily extends to the entire surface, while a sewer occupies but a small portion of the width. If the construction of a sewer necessarily interferes with water or gas pipes or a railroad, and causes damage thereto, there is no remedy and no taking, because the respective franchises are subject to the right of the city to construct sewers.<sup>81</sup> But it may be doubted

of their usefulness to the whole people, railroad companies are invested with large powers of a public nature. The laws of the state also provide for the organization of cities, and large powers are granted to them relating to the control and regulation of matters within the municipal limits; but, where a broad interpretation of such powers clashes with acquired property rights, as in this instance, such reasonable construction should be given them as shall not have the effect of destroying or even materially injuring such rights. The city must so use its powers as to enable the respondents to have a reasonable use and enjoyment

of theirs, and not so as to render it impossible or even very difficult for the respondents to reconstruct and operate their railroads."

<sup>78</sup> *Kansas City v. Kansas City Belt R. R. Co.*, 102 Mo. 633, 14 S. W. Rep. 808, 3 Am. R. R. & Corp. Rep. 522.

<sup>79</sup> *Delaware etc. R. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. Rep. 44; *Delaware etc. R. R. Co. v. Buffalo*, 158 N. Y. 478, 53 N. E. Rep. 533.

<sup>80</sup> *Paris Mountain Water Co. v. Greenville*, 53 S. C. 82, 30 S. E. Rep. 699.

<sup>81</sup> *Portsmouth Gas Light Co. v. Shanahan*, 65 N. H. 233, 19 Atl. Rep. 1002; *Kirby v. Citizens' R. Co.*, 48 Md. 168; *Brunswick Gas*

whether a city has an absolute discretion to locate a sewer where it pleases, regardless of the consequences to those having franchises in the street. Thus it has been held that the location of a sewer in the center of a street, on the line of a railroad, will be enjoined, when it can just as well be laid elsewhere in the street.<sup>82</sup> Where a street was laid out over a railroad right of way without making the railroad a party, it was held that it could recover any expense incurred in consequence of a sewer being built across its tracks on such street.<sup>83</sup>

§ 122. Further, as to rights of abutting owners.—Transferred to §§ 91c-91h.

§ 123. Right to compensation in case of elevated railroads.—Transferred to § 115b.

§ 124. Horse railroads in streets.—Transferred to § 115c.

§ 125. Horse railroads; miscellaneous points.—Transferred to § 121c, and other sections.

#### IV. OTHER USES OF STREETS.

§ 126. What are legitimate street uses generally.—In regard to the uses which the public authorities can make, or authorize to be made, of the land acquired for streets, the general rule is that streets are laid out primarily to accommodate the public in traveling from place to place, and that the right attaches to do whatever is necessary or proper to facilitate such travel in the usual and ordinary modes. "The primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of

Light Co. v. Brunswick, 92 Me. 493, 43 Atl. Rep. 104; Railway Co. v. Louisville, 8 Bush. 415; Kansas City etc. R. R. Co. v. Morley, 45 Mo. App. 304; Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274; Bryn Mawr Water Co. v. Lower Marion Tp., 15 Pa. Co. Ct. 527; Brooklyn El. R. R. Co. v. Brooklyn, 2 App. Div. 98, 37 N. Y. Supp. 560; San

Antonio v. San Antonio St. R. R. Co., 15 Tex. Civ. App. 1.

<sup>82</sup> Clapp v. City of Spokane, 53 Fed. Rep. 515; Des Moines City R. Co. v. City of Des Moines, 90 Ia. 770, 58 N. W. Rep. 770. Contra, Spokane St. R. R. Co. v. City of Spokane, 5 Wash. 634, 32 Pac. Rep. 456.

<sup>83</sup> Baltimore v. Cowen, 88 Md. 447, 41 Atl. Rep. 900.

intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it."<sup>1</sup>

<sup>1</sup> *Eels v. American Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69. In *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. & Corp. Rep. 258, the court says: "The right of the commonwealth is to use by going along over. This is the extent of the right. If the right was granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law and the whole extent of it. If anything more is taken, it is an additional servitude, and is a taking of the property, within the meaning of the constitution." See also *Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass'n*, 48 Ohio St. 390, 27 N. E. Rep. 890, 4 Am. R. R. & Corp. Rep. 533; *Dalley v. State*, 51 Ohio St. 348, 37 N. E. Rep. 710, 10 Am. R. R. & Corp. Rep. 687. On the other hand, the Supreme Court of Minnesota in a recent case has declared in favor of a more enlarged conception of the purpose of highways. It says: "It seems to us that a limitation of the public easement in highways to travel and the transportation of persons and property in mov-

able vehicles is too narrow. In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advanced, and new and improved methods of communication and transportation were developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public "highway easement," and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or test of universal application as to what is or what is not a legitimate "street or highway use."

But, while the purpose of streets is primarily for public travel, yet in populous districts it has been the immemorial custom to employ them for other purposes of a public nature which, though having little or no connection with the use or improvement of the street as a highway, are not inconsistent with such use.<sup>2</sup> Out of this usage has grown up a rule that streets in cities and villages may be used for various incidental purposes, such as sewer, gas and water pipes. The best general statement of this rule, which we have met with, is found in the case of *In re City of Yonkers*,<sup>3</sup> and is as follows: "It is part of the purpose in view when land is taken or dedicated for use as a public street

Courts have often attempted to do so, but have always been compelled by the logic of events to shift their ground. The only safe way is to keep in mind the general purpose of highways, and adopt a gradual process of inclusion and exclusion as cases arise. \* \* \* It is said that 'the primary law of the street is motion.' It is true, motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas, and steam are immovable. So are the tracks of street railways, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of

the land upward and downward indefinitely. If the transmission of intelligence by telegraph or telephone is not included in the public easement in a highway, it would be equally an invasion of his rights of property, even if the wires were placed underground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easements of abutting owners." *Cater v. N. W. Tel. Exch. Co.*, 60 Minn. 539, 63 N. W. 111. Two judges dissented. Similar views are expressed in *Millagee v. Overshiner*, 150 Ind. 127, and *Taylor v. Portsmouth*, etc. St. R. R. Co., 91 Me. 193.

<sup>2</sup> "No structure upon the street can be authorized which is inconsistent with the continued use of the same as an open public street." *Story v. New York El. R. R. Co.*, 90 N. Y. p. 177.

<sup>3</sup> 117 N. Y. 564, 573, 23 N. E. Rep. 661.

in a city, that it shall be used not only for the purpose of mere passage and repassage, but for all such incidental purposes, including the building of sewers therein, as may be necessary, appropriate and usual for the proper enjoyment of such street."<sup>4</sup> But these generalizations are of but little practical value. As to every new use proposed the question will arise as to whether it is an exercise of the right of passage or is such a purpose as is "necessary, appropriate and usual" for the "proper enjoyment" of the street.<sup>5</sup>

§ 127. **Sewers and drains.**—Drainage is necessary for the proper construction and maintenance of highways, both in city and country. The manner in which this drainage can be best secured is solely a question for the proper authorities. In the country, an open drain may suffice, but in the city, where the whole surface of the street is needed for travel, a covered sewer is required. As the proper drainage of house-lots and cellars, and the prompt removal of the liquid refuse from dwellings, are necessary to the public health, and therefore matters of public concern, the public may provide the means for such drainage and removal and construct public sewers in the streets for that purpose.<sup>6</sup>

<sup>4</sup> See also *McDevitt v. People's Nat. Gas. Co.*, 160 Pa. St. 367, 28 Atl. Rep. 948; *Van Brunt v. Town of Flatbush*, 59 Hun, 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545.

<sup>5</sup> In *Halsey v. Rapid Transit St. R. R. Co.*, 47 N. J. Eq. 350, 20 Atl. Rep. 859, it is said: "Any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not in any substantial degree destroy the street as a means of free passage, common to all the people, is a legitimate use, and within the purposes for which

the public acquired the land."

<sup>6</sup> *Cone v. Hartford*, 23 Conn. 363, 372; *Boston v. Richardson*, 13 Allen, 146, 159; *Warren v. Grand Haven*, 30 Mich. 24; *Kelsey v. King*, 32 Barb. 410; *Allison v. Cincinnati*, 2 Cinn. Supr. Ct. 462; *Cincinnati v. Penny*, 21 Ohio St. 499; *Traphagen v. Jersey City*, 29 N. J. Eq., 206; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *S. C. on appeal*, 28 N. J. Eq. 446; *Leeds v. Richmond*, 102 Ind. 372; *White v. Yazoo City*, 27 Miss. 357; *McMahon v. Council Bluffs*, 12 Ia. 268; *Glasby v. Morris*, 18 N. J. Eq. 72; *Chelsea Dye-House and Laundry Co. v. Commonwealth*, 164 Mass. 350, 41 N. E. Rep. 649; *In re City of*

But a sewer, constructed through the streets of a town, which is not for use of the town or the abutting owners, but solely to carry the sewerage of an adjoining town to the sea, is an additional servitude upon the street and cannot be built without compensation to the owners of the fee.<sup>7</sup> The making of a drain or open ditch on the side of a street, if for the amelioration of the street, is a proper use of the street, for which the abutting owner has no legal ground of complaint.<sup>8</sup> But the public authorities cannot authorize

Yonkers, 117 N. Y. 564, 23 N. E. Rep. 661; *Elster v. Springfield*, 49 Ohio St. 82, 34 N. E. Rep. 274; *Lockart v. Craig St. R. R. Co.*, 139 Pa. St. 419, 21 Atl. Rep. 26 (dictum); *Lincoln v. Commonwealth*, 164 Mass. 1, 41 N. E. Rep. 112; *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. Rep. 344.

In *Cone v. Hartford*, the court says: "There cannot be a doubt that, in the laying out and establishment of a highway, the right of repairing and maintaining, as well as of originally constructing it, is embraced, and therefore, when damages are assessed to a person for laying out and constructing a road upon his land, those damages include compensation as well for the repairing of such road as its original construction. Such repairation embraces and extends to the making of such gutters, drains and sewers as are necessary and proper in order to preserve the highway in good condition for the purposes for which it was made. And, for these purposes, we have no doubt that it is as competent to construct drains and sewers below, as it is upon the surface of the ground. On ordinary country roads the gutters upon

their sides are usually deemed sufficient to carry off the water and filth upon them. In populous places, however, where they accumulate in greater quantities, or where it may be necessary for the public to use, for passing and other proper purposes, every part of the highway, it is frequently requisite to make the drains of the highway beneath its surface, and the safety as well as the commodiousness of the public travel, and the healthfulness of the people in its vicinity may also require it. It is no objection, therefore, to a sewer in a highway, that it is made beneath the surface of the ground, if the circumstances render it proper so to construct it."

<sup>7</sup> *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 27 N. E. Rep. 973, reversing S. C. 59 Hun 192, 37 N. Y. St. 200, 13 N. Y. Supp. 545. Compare *Cummins v. City of Seymour*, 79 Ind. 491.

<sup>8</sup> *White v. Yazoo City*, 27 Miss. 357; *McMahon v. Council Bluffs*, 12 Ia. 268; *Cummins v. City of Seymour*, 79 Ind. 491; *Willson v. Duncan*, 74 Ia. 491, 38 N. W. Rep. 871; *Randall v. Christiansen*, 76 Ia. 169, 40 N. W. Rep. 703; *Highway Comrs. v. Ely*, 54 Mich. 173.



a private drain to be laid in a street over the fee of others."

§ 128. **Water pipes.**—Water is a prime necessity, and in densely populated districts cannot be obtained from the soil without danger to health. A supply of pure water, therefore, becomes a matter of public concern, and its distribution by public authority by means of pipes laid in the public streets is an ancient and universal custom. Such a supply is not only a requisite to the public health, but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagrations, and may even be connected with the use of the street for travel, when used for sprinkling. Such a use of urban streets is proper and legitimate.<sup>10</sup> But to lay pipes in a country highway for the purpose of conducting water to a town would be an additional burden for which the owner of the fee would be entitled to compensation.<sup>11</sup> Where a water pipe was laid underneath the sidewalk, so as to prevent the abutter building stairs to his basement, it was held he could recover no compensation.<sup>12</sup>

§ 129. **Gas pipes.**—Gas is not, like water, a necessity in the sense of being absolutely indispensable, but it has become a practical necessity in all urban communities. The right to lay pipes in the streets of cities and villages for the distribution of gas has never been questioned, but has often, indirectly, received judicial sanction.<sup>13</sup> But a country highway cannot be used for the purpose of convey-

\* *Murray v. Gibson*, 21 Ill. App. 488. But the contrary is held in *Wood v. McGrath*, 150 Pa. St. 461, 24 Atl. Rep. 682. And see *Smith v. Simmons*, 103 Pa. St. 32; *Borough v. Simmons*, 112 Pa. St. 384; *Glasby v. Morris*, 18 N. J. Eq. 72; *Conrad v. Smith*, 32 Mich. 429.

<sup>10</sup> *Crooke v. Flatbush Water Works Co.*, 29 Hun 245; *Same v. Same*, 27 Hun 72; *Witcher v. Holland W. W. Co.*, 66 Hun 619, 20 N. Y. Supp. 560; same affirmed without opinion, 142 N. Y. 626;

*Village of Pelham Manor v. New Rochelle Water Co.*, 143 N. Y. 532, 38 N. E. Rep. 711; *Provost v. New Chester Water Co.*, 162 Pa. St. 275, 29 Atl. Rep. 914; *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, 45 N. E. Rep. 925; *Smith v. Goldsboro*, 121 N. C. 350.

<sup>11</sup> See ante § 127, note 7; post § 129, note 14.

<sup>12</sup> *Provost v. New Chester Water Co.*, 162 Pa. St. 275, 29 Atl. Rep. 914.

<sup>13</sup> *Story v. New York Elevated*

ing natural gas to a distant city.<sup>14</sup> This is an additional burden, for which compensation must be made. A city is not entitled to compensation for the laying of gas pipes in its streets by authority of the legislature,<sup>15</sup> but it may prevent such use of its streets without authority.<sup>16</sup> It has been held that one gas company has no standing in court to contest the right of a rival company to occupy a street, so long as its property and rights are not interfered with.<sup>17</sup>

§ 130. Steam, electricity, etc.—Within the principle of the foregoing cases would be the laying of pipes in streets, for the purpose of conducting and distributing gas or steam for heating, or the laying of subterranean cables or wires for supplying electricity, either for lighting or other general use.<sup>18</sup> But a pipe for conveying salt water is not

R. R. Co., 90 N. Y., at p. 161; West v. Bancroft, 32 Vt. p. 371; Thompson v. Hogdson, 2 Hun 146; People v. Bowen, 30 Barb. 24; Smith v. Central Dist. Tel. Co., 2 Ohio C. C. 259, 263; Pierce v. Drew, 136 Mass. 75, 81; McDevitt v. People's Natural Gas Co., 160 Pa. St. 367, 23 Atl. Rep. 948. The position is questioned in Boston v. Richards, 13 Allen 146, 160, and denied in Mallory v. City of Bradford, 1 Pa. Dist. Ct. 670; King v. Philadelphia Co., 154 Pa. St. 160, 26 Atl. Rep. 308; Lewis v. Newton, 75 Fed. 884.

<sup>14</sup> Bloomfield etc. Gas Light Co. v. Calkins, 62 N. Y. 386; S. C. 1 Thomp. etc., 541, 549; Sterling's Appeal, 111 Pa. St. 35; Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 24 N. E. Rep. 1066, 3 Am. R. R. & Corp. Rep. 1; Board of Comrs. v. Indianapolis Nat. Gas Co., 134 Ind. 209, 33 N. E. Rep. 972; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156, 39 N. E. Rep. 423, 42

N. E. Rep. 640; Calkins v. Bloomfield etc. Gas Light Co., 1 N. Y. Supm. 541; Hoffman v. State, 21 Ind. App. 449; Windfall Nat. Gas Co. v. Terwilliger, 152 Ind. 364, 53 N. E. Rep. 284.

<sup>15</sup> People v. Bowen, 30 Barb. 24.

<sup>16</sup> Citizens' Gas etc. Co. v. Elwood, 114 Ind. 332. So such use of the streets may be prevented by indictment. Queen v. Longton Gas Co., 2 El. & El. 651, 105 E. C. L. R. 650.

<sup>17</sup> Coffeyville M. & Gas Co. v. Citizens' Nat. Gas Co., 55 Kan. 179, 40 Pac. Rep. 326. But see People's Gas Light Co. v. Jersey City Gas Light Co., 46 N. J. L. 297.

<sup>18</sup> Carli v. Railroad Co., 28 Minn. at p. 376; Berks & Dauphin Turnpike Road v. Lebanon Steam Co., 5 Pa. Co. Ct. 354; Empire City Subway Co. v. Broadway & S. A. R. R. Co., 87 Hun 279, 33 N. Y. Supp. 1055. But see post § 131a.

Where the legislature grants

within the easement of a highway.<sup>19</sup>

§ 131. **Telegraph and telephone lines.**—The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed upon his land.<sup>20</sup> When the fee is in the public, the abutting owner may recover for any interference with his rights in

the right to a company to place and maintain its electric wires underground subject to the regulations of the municipality, the latter may require the grantee to take the wires of other companies in its conduits or the city may provide the conduits for all the wires. *State v. Towers*, 71 Conn. 657, 42 Atl. Rep. 1083.

<sup>19</sup> *Hartman v. Tulley Pipe Line Co.*, 71 Hun 367, 25 N. Y. Supp. 24.

<sup>20</sup> *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69; *Bashfield v. Empire State Tel. Co.*, 71 Hun 532, 24 N. Y. Supp. 1006; *Dusenbury v. Mutual Union Tel. Co.*, 11 Abb. New Cases, 440; *Metropolitan Telephone & Telgraph Co. v. Colwell Lead Co.*, 50 N. Y. Supr. Ct. 488; *Tiffany v. United States Illuminating Co.*, 51 N. Y. Supr. Ct. 280; S. C. 67 How. Pr. 73; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 9 So. Rep. 356; *Dailey v. State*, 51 Ohio St. 348, 37 N. E. Rep. 710; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 520; *Smith v. Central District P. & Tel. Co.*, 2 Ohio C. C. 259; *West-*

*ern Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. & Corp. Rep. 258; *Pacific Postal Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690; *Nicoll v. New York etc. Co.*, 62 N. J. L. 733, S. C. 62 N. J. L. 156; *Comisky v. Postal Tel. Cable Co.*, 41 N. Y. App. Div. 245; *American Tel. & Tel. Co. v. Jones*, 78 Ill. App. 372. In *Eels v. Am. Tel. & Tel. Co.*, supra, the court says: "We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation; but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the ques-

tion is, what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement. If this easement do not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant herein has no defense to the plaintiff's claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance of property or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it. \* \* \* We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered

method of exercising the old public easement, for the very reason that this so-called "new method" is a permanent, continuous and exclusive use and possession of some part of the public highway itself, and, therefore, cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method or means of locomotion. All these might be varied, increased as to number, capacity or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same—a highway for passage and motion of some sort. Here, however, in the use, of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway."

In *Willis v. Erie T. & T. Co.*, 37 Minn. 347, the court was equally divided and the judgment of the lower court in favor of the abutting owner was affirmed, no opinion being given. In New Jersey an act passed March 11, 1880, Supp. to Rev. Stat. p. 1022, requires compensation to be made when telegraph or telephone poles are set in a street. The following cases have arisen under the statute involving its validity and the method of pro-

the street.<sup>21</sup> It is evident that poles and wires may be so placed as not to afford the slightest impediment to the access of light and air or to ingress and egress. In such case there is no taking, because there is no damage.<sup>22</sup>

cedure under it: *Turnpike Co. v. News Co.*, 43 N. J. L. 381; *Broome v. N. Y. & N. J. Tel. Co.*, 49 N. J. L. 624; *Winter v. N. Y. & N. J. Tel. Co.*, 51 N. J. Eq. 83. In *Roake v. Am. Telephone & Telegraph Co.*, 41 N. J. Eq. 35, the chancellor refused a preliminary injunction on a bill filed to prevent the stringing of wires in front of the plaintiff's premises on the ground that his right was doubtful. In *Broome v. N. Y. & N. J. Tel. Co.*, 42 N. J. Eq. 141, a mandatory injunction was granted to compel the removal of poles set in the highway in front of plaintiff's premises, the fee of the street being in him, and the erection of other poles was prohibited. In *Howell v. Western Union Tel. Co.*, 4 Mackey, 424 (1886), an injunction to prevent the erection of telegraph poles in front of the plaintiff's property was denied on the ground that plaintiff would suffer no irreparable injury and that the remedy at law was adequate. The main question was not discussed.

<sup>21</sup> In *Chesapeake, etc. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690, the right to compensation was sustained irrespective of the fee of the street. On this point the court says: "If the fee be in the city, or in some third person, then—First, what are the rights, in a case like this, of the owner of a lot abutting

on the street? and, secondly, how are those rights affected by the provisions of the Code relied on in the pleas? There is some diversity of opinion in the decided cases upon the first of these questions, but all agree in going at least this far—and we are not required to go any further in deciding this appeal—that where the fee or legal title has passed from the original proprietor, as in cases where the land has been acquired for streets by the exercise of the right of eminent domain, the adjoining owner cannot maintain an action for injuries to the soil or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others. Hence, if an appropriation of a street by a person or body corporate, even under legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation; and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the abutter may sustain."

<sup>22</sup> *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485; *Forsyth v.*

Whether there is or is not damage is a question of fact, and, if damage can be shown, the remedy is clear upon the authority of cases discussed in previous sections of this chapter.<sup>23</sup> There is a strong dissent from these views, several of the courts holding that a telegraph or telephone line is a legitimate street use, and may be placed in a street without compensation to the abutting owner, whether he owns the fee or not.<sup>24</sup> As will be seen by reference to the

Baltimore & Ohio Tel. Co., same, p. 494.

<sup>23</sup> A city cannot grant the right to place poles and wires in a street unless authorized to do so by the legislature. *Domestic Telegraph Co. v. Newark*, 49 N. J. L. 344.

<sup>24</sup> *Pierce v. Drew*, 136 Mass. 75; *Julia Building Ass'n. v. Bell Tel. Co.* 88 Mo. 258; *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. Rep. 197; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485; *Forsythe v. Baltimore & O. Tel. Co.*, 12 Mo. App. 494; *Irwin v. Great Southern Telephone Co.*, 37 La. An. 63; *People v. Eaton*, 100 Mich. 208, 59 N. W. Rep. 145, *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mon. 102, 29 Pac. Rep. 883; *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 539, 63 N. W. Rep. 111. Compare with last case *Willis v. Erie Tel. & Tel. Co.*, 37 Minn. 347, 34 N. W. Rep. 337, *Magee v. Obershiner*, 150 Ind. 127. These cases all go upon substantially the same ground which is thus stated in *Pierce v. Drew*, 136 Mass. 75, 81: "When the land was taken for a highway that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for

either the conveyance of property or the transmission of intelligence. \* \* \* The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy and the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out." These views are most ably and convincingly answered in the dissenting opinion in the same case. To say that a telegraph or telephone line is a legitimate street use because it accomplishes some of the objects for which the street is established, lays down a principle which justifies the use of a street for the commercial railroad, the elevated railroad or even for a canal. There is absolutely no analogy between ordinary travel and the telegraph or telephone, and it is even more foreign to street uses proper than the commercial railroad.

notes, the courts of last resort are about equally divided on the question. The text writers generally favor the right to compensation.<sup>25</sup>

§ 131a. **Electric wires for lighting and other purposes.**—It seems beyond question from the authorities that, under the general power to improve streets and render them more convenient and safe for travel, the public authorities may provide for lighting them at night. If this is so, it can hardly be that such authorities are limited to any particular kind or system of lighting. It follows that poles and wires may be placed in the street for the purpose of lighting them by means of electricity. Such a use is directly connected with and incident to the public right of passage. The abutting owner would have no ground of complaint, in the absence of any abuse of the right to so use the street.<sup>26</sup> The lighting of private premises, however, has no connection whatever with the use of a street for public passage,

<sup>25</sup> 2 Dill. Munic. Corp. § 698a; Elliott, Roads and Streets, pp. 533-536; Keasbey on Electric Wires, pp. 82-84. We also refer to the following cases as having some bearing on the subject: Southern Bell Tel. & Tel. Co. v. Francis (Ala.), 19 So. Rep. 1; State v. Bayonne, 59 N. J. L. 101, 34 Atl. Rep. 1080; Postal Tel. Cable Co. v. Baltimore, 79 Md. 502, 29 Atl. Rep. 819; St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 S. C. Rep. 990; Wirth v. Postal Tel. Cable Co., 7 Ohio C. C. 290; York Tel. Co. v. Kersey, 5 Pa. Dist. Ct. 366; Bradley v. Southern New Eng. Tel. Co., 66 Conn. 559, 34 Atl. Rep. 499; Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass'n, 48 Ohio St. 890, 27 N. E. Rep. 890, 4 Am. R. R. & Corp. Rep. 533; Russ v. Pennsylvania Tel. Co., 15 Pa. Co. Ct.

226; Memphis Tel. Co. v. Hun, 16 Lea, 456; Hudson Riv. Tel. Co. v. Watervliet T. & R. R. Co., 135 N. Y. 393, 32 N. E. Rep. 148, 6 Am. R. R. & Corp. Rep. 619; Rugg v. Commercial Union Tel. Co. (Vt.), 28 Atl. Rep. 1036; Western Union Tel. Co. v. Bullard, 67 Vt. 272, 31 Atl. Rep. 286. The case of American Tel. & Tel. Co. v. Pearce, 71 Md. 535, 18 Atl. Rep. 910, 1 Am. R. R. & Corp. Rep. 73, decides that a telegraph or telephone line on a railroad right of way for general commercial use, is an additional burden on the soil for which the owner is entitled to compensation.

<sup>26</sup> Loeber v. Butte General Electric Co., 16 Mon. 1, 39 Pac. Rep. 912, 11 Am. R. R. & Corp. Rep. 260; Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. Rep. 1092.

and the placing of poles and wires or other appliances in the street for that purpose cannot, therefore, be justified as a street use.

It would follow that poles and wires, to be used exclusively for private lighting, cannot be placed in a public street without compensation to the abutting owner for any damage sustained.<sup>27</sup> In regard to poles and wires to be used for both public and private lighting, the logical position would seem to be that the abutting owner would be entitled to a remedy to the extent of the unlawful use. It may be doubted, however, whether these distinctions are practicable, and it is probable that the use of streets for electric light wires will be sustained, without regard to whether they are for public or private lighting, but that the abutting owner will have a remedy for any unnecessary injury to his rights, as by obstructing his doorway with a pole.<sup>28</sup> In Massachusetts poles and wires for electric

<sup>27</sup> See *Carpenter v. Capital Elec. Co.*, 178 Ill. 29.

<sup>28</sup> In *Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Supr. Ct. 464 (1883), the suit was to prevent the erection of electric light poles in the street in front of plaintiff's property, and to compel the removal of those already erected. The fee of the street was in the public for street uses. The poles were to be used for street lighting and for private lighting. Ingraham, J., denied the relief, holding that such poles for the purpose of lighting the street were proper, but doubting whether poles could be erected for the purpose of lighting private premises. In the same year, Maxwell, J., of the court of common pleas of Ohio, enjoined the erection of electric light poles in the street, though the plaintiff did not have the fee. *McLean v. Brush Elec-*

*tric Light Co.*, 9 Cinn. Law Bull. 65 (1883). In *People ex rel. McManus v. Thompson*, 65 How. Pr. 407 (1883), Haight, J., held that poles and wires for street lighting were a proper use of a street. The decision in the case was affirmed without passing upon this question. 32 Hun, 93. In *Tiffany v. U. S. Illuminating Co.*, 57 N. Y. Supr. Ct. 280; 67 How. Pr. 73 (1885), the New York superior court, general term, affirmed a decree enjoining the erection of electric light poles in front of plaintiff's property. The court says: "Its business is to furnish light to the city corporation for the public lighting of the streets, and to private individuals to light private houses. The former may involve a public and ordinary use of the street; the latter would involve a use of the street for private purposes. On the



lighting are, by statute, placed upon the same footing as poles and wires for the telegraph and telephone. Compensation must be made to abutting owners for any injury to their property caused thereby, but not for any injury to the fee of the street.<sup>29</sup> At the present time it is common to use the streets for wires for fire alarm purposes, and to aid in the police service. Electricity is also distributed to some extent by means of wires in streets to be converted into mechanical power. It is not too much to expect that at no distant day its use for this purpose will greatly increase,

plaintiff showing that the defendant, a private corporation, is about to obstruct the street with poles, etc., it would appear *prima facie*, that it was without authority to do so. The defendant, to absolve itself from responsibility, must show the authority. Its evidence on this point is most general and does not show that every part of its proposed work is necessary or highly convenient for both the public and the private use. It is entirely consistent with the testimony, that the particular pole and wire that would be in front of the plaintiff's house, would not be necessary to the public use." In *Johnson v. Thompson-Houston Electric Co.*, 54 Hun, 469, 7 N. Y. Supp. 716 (1889), it was held at general term that an abutting owner could not compel the removal from in front of his premises of an electric light pole, from which a street lamp was to be suspended, and which was to be used both for lighting the streets and private premises. It was doubted whether a street could be used for poles and wires for private lighting, and intimated that the plaintiff might

have such use enjoined until compensation was made. *Consumers' Gas & El. Light Co. v. Congress Spring Co.*, 60 Hun, 133, 39 N. Y. St. 703, 15 N. Y. Supp. 624 and *Berlew v. Electric Illuminating Co.*, 1 Pa. Co. Ct. 651 (1886) support the view that light wires are a legitimate street use. So does *Loeber v. Butte General Electric Co.*, 16 Mon. 1, 39 Pac. Rep. 912, 11 Am. R. R. & Corp. Rep. 260, where it was held that the plaintiff could not enjoin the erection of a light pole in an alley, in the rear of his premises, the fee of which was in the public. See also *Electric Construction Co. v. Hefferman*, 12 N. Y. Supp. 336. In *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. 369, 1 Pa. Dist. Ct. 571, electric light poles were held to be an additional burden on a country highway. Also in *Palmer v. Larchmont Electric Co.*, 6 App. Div. 12, 39 N. Y. Supp. 522.

<sup>29</sup> See *Suburban Light & Power Co. v. Board of Aldermen*, 153 Mass. 200, 26 N. E. Rep. 447; *Pub. Stats. Mass. c. 109; Acts, 1883, c. 221; Acts, 1889, c. 398.*

and also that it will become practicable for heating purposes. It is manifest, however, that while all these applications of electricity subserve a public purpose in aid of which the power of eminent domain may be invoked, none of them are connected with or in aid of the public right of passage in a street, and are not properly street uses.<sup>30</sup> Although the process of putting electric wires under the surface of streets, for the various purposes for which they are used, has been going on for a number of years, no question appears to have been made by abutting owners as to the right to use the streets in that way.<sup>31</sup>

§ 132. **Markets.**—A public market is entirely foreign to the legitimate uses of a public highway, and when a part of the highway is devoted to such use by legislative authority, the abutting owner is entitled to compensation, whether the fee is in him or in the public.<sup>32</sup> But, where fifty feet in the

<sup>30</sup> See *Edison Elec. Ill. Co. v. Hooper*, 85 Md. 110, 36 Atl. Rep. 113; *Smith v. Goldboro*, 121 N. C. 350.

<sup>31</sup> In *State v. Murphy (Mo.)*, 34 S. W. 51, it was held that the privilege of constructing electrical subways in the streets of a city could not be granted to a private company, whose object was to lease the same for gain, though they were expected to be leased for public uses. We refer to the following cases growing out of electric light wires in streets, but which did not involve any controversy with abutting owners. *City of Newport v. Newport Light Co.*, 89 Ky. 454, 12 S. W. Rep. 1040, 1 Am. R. R. & Corp. Rep. 397; *State v. Murphy*, 130 Mo. 10, 31 S. W. Rep. 594, 12 Am. R. R. & Corp. Rep. 370; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. Rep. 94; *Nebraska Tel. Co. v. York Gas & El. Light Co.*, 27

Neb. 284, 43 N. W. Rep. 126; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & G. Co.*, 33 Fed. Rep. 659.

<sup>32</sup> *State v. Lavanac*, 34 N. J. L. 201, 205; *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306; *State v. Mobile*, 5 Porter, Ala. 279; *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. Rep. 898, 8 Am. R. R. & Corp. Rep. 391; *Herrick v. Cleveland*, 7 Ohio C. C. 470. In the first case the court say: "I think the true rule is that land taken by the public for a particular use cannot be applied, under such a sequestration, to any other use, to the detriment of the land-owner. This is the only rule which will adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the land-owner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would

middle of a street was condemned for market purposes, the abutting owners cannot enjoin its use for that purpose on account of the concourse of teams in front of their property thereby occasioned.<sup>33</sup>

§ 132a. **Destruction of or injury to shade trees in streets.**—Where the public owns the fee of the street, the abutting owner has no proprietary right in the soil or minerals, or in the herbage or trees growing thereon. The public authorities may, therefore, cut or remove the trees in their discretion, and the abutter has no remedy, though his property may be damaged thereby.<sup>34</sup> But when the abutter owns the fee of the street, he owns the trees thereon, subject to the public easement.<sup>35</sup> The rights of the public in such case are thus stated in a recent Wisconsin case: "The right of the public to use the street for purposes of travel extends to the portions set apart or used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot-owner abuts. As against the lot-owner, the city as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends, to its entire width, and whether it will so open and improve it, or

be a mere evasion of the spirit of the fundamental law of the State. Land taken and applied for the ordinary purposes of a street would often be an improvement of the adjacent property; an appropriation of it to the uses of a market would, perhaps, as often be destructive of one-half of the value of such property." In *Philadelphia v. Slocum*, 14 Phil. 141, it was held that where land was dedicated for a street with a proviso that a certain space in the center should be used for market purposes, the city might abandon the market and

improve the whole as a street.

<sup>33</sup> *Henkle v. Detroit*, 49 Mich. 249. And see *Miller v. Webster City*, 94 Ia. 162, 62 N. W. 648, 11 Am. R. R. & Corp. Rep. 346. Where a city authorized the use of a street for market purposes by allowing wagons to stand against the curb for purposes of traffic, whereby a nuisance resulted, it was held that the abutting fee owner could enjoin. *Richmond v. Smith*, 148 Ind. 294.

<sup>34</sup> *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. Rep. 509.

<sup>35</sup> *Post*, § 590; *Lancaster v. Richardson*, 4 Lans. 136.

whether it should be so opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed. With this discretion of the authorities, courts cannot ordinarily interfere upon the complaint of a lot-owner, so long as the easement continues to exist; and no mere non-user, however long continued, will operate as an abandonment of the public right, even though, until needed for a public use, the authorities should treat the street as the property of the owner of the lot. The public authorities, representing its interests, will not be thereby estopped from removing obstructions therefrom, and opening and fitting it for public use to its entire width.<sup>36</sup> The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the street shall be improved. Courts can interfere only in cases of fraud or oppression, constituting manifest abuse of discretion."<sup>37</sup> Undoubtedly the proper public authorities may cause the removal of shade trees in a street where they constitute an obstruction to travel or when necessary for the improvement of the street without liability to the owner of the fee.<sup>38</sup> But, as intimated in the *Wisconsin* case above quoted, the courts will interfere to prevent or redress the wrong to the owner of the fee by the removal of trees, when the authorities abuse the discretion vested in them. And it is an abuse of discretion to remove valuable shade trees when there is no reasonable necessity therefor.<sup>39</sup> In Massachusetts shade trees are pro-

<sup>36</sup> Citing *State v. Leaver*, 62 Wis. 387, 22 N. W. Rep. 576; *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. Rep. 417; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. Rep. 587.

<sup>37</sup> *Chase v. City of Oskosh*, 81 Wis. 313, 51 N. W. Rep. 560, 6 Am. R. R. & Corp. Rep. 1. This case is quoted and approved in *Tate v. City of Greensborough*, 114 N. C. 392, 19 S. E. Rep. 767.

<sup>38</sup> *Ibid.*; *Patterson v. Vail*, 43 Iowa, 142; *Castleberry v. Atlanta*, 74 Ga. 164; *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. Rep. 266.

<sup>39</sup> *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. Rep. 509; *Bills v. Belknap*, 36 Ia. 583; *Everett v. Council Bluffs*, 46 Ia. 66; *Crisman v. Deck*, 84 Ia. 344, 51 N. W. Rep. 55; *Cross v. Morristown*, 18 N. J. Eq. 305, 313;

tected by statute, and can only be removed upon complaint to the proper authorities and a determination by them that the public necessity so requires, of which proceeding the owner is entitled to notice with an opportunity to be heard.<sup>40</sup>

Whether trees may be mutilated or removed to make room for electric wires or railroads or other such uses, will depend upon the view taken as to whether these are legitimate street uses. If they are held to be so, then they stand upon the same footing as ordinary street improvements.<sup>41</sup> If not, then they cannot be placed in the street at all without compensation to the abutter, and this compensation would include any injury to his trees. For any unauthorized interference with shade trees for any of these purposes, the abutter, owning the fee, may recover damages.<sup>42</sup>

§ 132b. Interfering with access by obstructing street at a distance from the plaintiff's property.—To avoid a grade crossing near plaintiff's property, the street was closed at that point and a new street opened, so as to leave plaintiff fronting upon a cul de sac. It was held that he was not entitled to recover damages.<sup>43</sup> A contrary decision has

Tainter v. Morristown, 19 N. J. Eq. 46; State v. Mayor etc. of Vineland, 56 N. J. L. 474, 28 Atl. Rep. 1039; City of Mt. Carmel v. Bell, 52 Ill. App. 427; City of Mt. Carmel v. Shaw, 52 Ill. App. 429.

<sup>40</sup> White v. Godfrey, 97 Mass. 472; Bliss v. Ball, 99 Mass. 597; Chase v. City of Lowell, 149 Mass. 85, 21 N. E. Rep. 283.

<sup>41</sup> Dodd v. Consolidated Trac-tion Co., 57 N. J. L. 482, 31 Atl. Rep. 980; Southern Bell Tel. & Tel. Co. v. Francis (Ala.), 19 So. Rep. 1; McAntire v. Joplin Tel. Co., 75 Mo. App. 535.

<sup>42</sup> Hoyt v. Southern New. Eng. Tel. Co., 60 Conn. 385, 22 Atl. Rep. 957; Bradley v. Southern New Eng. Tel. Co., 66 Conn. 559, 34 Atl. Rep. 499; Tisso v. Great

So. Tel. & Tel. Co., 39 La. An. 996, 3 So. Rep. 261; McCruden v. Rochester R. R. Co., 5 Misc. 59, 25 N. Y. Supp. 114; Memphis Tel. Co. v. Hun, 16 Lea, 456; O'Connor v. Nova Scotia Tel. Co., 22 Duvall, 276; Rockford Gas etc. Co. v. Ernst, 68 Ill. App. 300.

<sup>43</sup> Davis v. County Comrs. 153 Mass. 218, 26 N. E. Rep. 848. The court says: "Although the doctrine may sometimes be rather harsh in its application to special cases, there are sound reasons on which it rests. The chief of these reasons are, that to hold otherwise would be to encourage many trivial suits, that it would discourage public improvements if a whole neighborhood were to be allowed to re-

been made in Minnesota,<sup>44</sup> and this would seem to be the better rule.<sup>45</sup>

§ 133. **Miscellaneous uses.**—A well or cistern may be constructed in a street for the purpose of obtaining water to be used in sprinkling the streets or extinguishing fires or convenience of the public, provided this can be done without damage to the abutting owner or destruction of the public use.<sup>46</sup> The sprinkling of streets is one mode of making their use more convenient, and the public may use the street for such appliances for that purpose as are reasonable under the circumstances. But the plea that a structure is for use in the amelioration of the streets will not justify the serious obstruction of a street by the indirect means of such amelioration, as by the erection of pumping works in a street,<sup>47</sup> or a mill for sawing lumber or crushing stone for a pavement. Nor can a street be occupied by a stand pipe<sup>48</sup> or used for boring wells<sup>49</sup> to obtain a public water supply.

cover damages for such injuries to their estates, and that the loss is of a kind which purchasers of land must be held to have contemplated as liable to occur, and to have made allowance for in the price which they paid." To same effect: *Gerhard v. Seekonk Riv. Bridge*, 15 R. I., 334, 5 Atl. Rep. 199; *Sullivan v. Webster*, 16 R. I. 33, 11 Atl. Rep. 771; *Patterson v. Duluth*, 21 Minn. 493; and see *Shaw v. Boston & A. R. R. Co.*, 159 Mass. 597, 35 N. E. Rep. 92.

<sup>44</sup> *Brakken v. Minneapolis etc. R. R. Co.*, 29 Minn. 41, 31 Minn. 45. And see *Aldrich v. Minneapolis*, 52 Minn. 164, 53 N. W. Rep. 1072; *Autensleth v. St Louis etc. R. R. Co.*, 36 Mo. App. 254.

<sup>45</sup> Post, § 134.

<sup>46</sup> *West v. Bancroft*, 32 Vt. 367; *Barter v. Commonwealth*, 3 Penn. & Watts, 253; *Savage v.*

*Salem*, 23 Or. 381, 31 Pac. Rep. 832, 7 Am. R. R. & Corp. Rep. 428. In *Dubuque v. Malony*, 9 Ia. 450, the city had constructed a brick cistern in the street for similar purposes, and the defendant, in digging for the foundation of his building, removed the support of the soil so that it burst and was destroyed. The city sued for damages, and a recovery was denied on the ground that such use of the street, the fee being in the abutting owners, was not justified.

<sup>47</sup> *City of Morrison v. Hinkson*, 87 Ill. 587.

<sup>48</sup> *Barrows v. City of Sycamore*, 150 Ill. 538, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62, reversing S. C. 49 Ill. App. 590.

<sup>49</sup> *Odneal v. City of Sherman*, 77 Tex. 182, 14 S. W. Rep. 31. In *Lostutter v. City of Aurora*, 126

The erection of a pound for the confinement of stray animals, or of a jail or lock-up upon a public street, is a misappropriation which may be enjoined by the abutting owner,<sup>50</sup> or for which trespass will lie.<sup>51</sup> The erection of ornamental or memorial statuary at proper places in public streets is sanctioned by long and universal usage, and may be regarded as a legitimate use of the same.<sup>52</sup> The erection of lamps for street lighting, of hydrants, fire plugs, drinking fountains and watering troughs, all fall within the principles heretofore laid down as to the appropriate use of streets. Weighing scales cannot be placed in a street over the objection of an abutter who has the fee.<sup>53</sup> A canal for any purpose would seem to be a perversion of the street, and, therefore, a use which could not be authorized without compensation.<sup>54</sup> A street cannot be used for a warehouse or other building.<sup>55</sup> A city was held not liable to an abutting owner for obstructing access to his premises by wagons by means of a platform and step for the use of pedestrians.<sup>56</sup> An elevated footway over a street a hundred feet from plaintiff's premises was held to be no obstruction to his light and air, and so to afford him no cause of action.<sup>57</sup>

Ind. 436, 26 N. E. Rep. 184, it was held that a city could maintain a well and pump in a street without subjecting the soil to an additional servitude.

<sup>50</sup> Lutterloh v. Town of Cedar Keys, 15 Fla. 306.

<sup>51</sup> Winchester v. Capron, 63 N. H. 605.

<sup>52</sup> Thompson v. Hodgson, 2 Hun, 146.

<sup>53</sup> Cline v. Cornwall, 21 Grant Ch. 129. But where a city had power to provide for weighing hay, coal, etc., it was held that it could grant to an individual the right to place scales in the street in front of his premises and that, after such grant had been acted upon it could not be revoked. Town of Spencer v.

Andrew, 82 Ia. 14, 47 N. W. Rep. 1007.

<sup>54</sup> Tucker v. Inhabitants of Russell, 14 Pick. 279; Taylor v. Chicago etc. R. R. Co., 83 Wis. 636, 53 N. W. Rep. 853; City of Fresno v. Fresno Canal & Irr. Co., 98 Cal. 179, 32 Pac. Rep. 943; Walley v. Platte & D. Ditch Co., 15 Col. 579, 26 Pac. Rep. 129.

<sup>55</sup> Packet Co. v. Sorrels, 50 Ark. 466; Bingham v. Doane, 9 Ohio, 165; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. Rep. 358.

<sup>56</sup> Hobson v. City of Philadelphia, 155 Pa. St. 131, 25 Atl. Rep. 1046.

<sup>57</sup> Ottendorf v. Agnew, 13 Daly

When the abutter owns the fee, it has been held that a city cannot authorize the use of the street for a hack stand.<sup>58</sup> Where the fee is in the abutting owner, he is entitled to the herbage growing thereon, and a law or ordinance allowing it to be depastured by the public is void.<sup>59</sup> As to the taking of a highway for a turnpike or ferry landing, the reader is referred to a subsequent section.<sup>60</sup> No action will lie on account of changes in the relative width of roadway and sidewalk.<sup>61</sup> Under legislative authority the control of a city street may be turned over to park commissioners and traffic teams excluded therefrom, but it is intimated that if abutters are damaged thereby they would have a remedy.<sup>62</sup>

§ 134. **Vacating streets.**—We have seen that the owner of property abutting on a public street, no matter how established, and without regard to the ownership of the ultimate fee, has certain private rights in the street, among which is the right of access, which includes the right to use the street for the purpose of passing to and fro between his premises and some connecting thoroughfare.<sup>63</sup> These

16; *Knox v. New York*, 55 Barb. 404.

<sup>58</sup> *McCaffrey v. Smith*, 41 Hun, 117.

<sup>59</sup> *Woodruff v. Neal*, 28 Conn. 165; *Cole v. Drew*, 44 Vt. 49. Contra: *Hardenburg v. Lockwood*, 25 Barb. 9. Where such a law was in force when the highway was laid out, it was held that compensation was made in view of such statute, and that the act was valid as to such highway. *Griffin v. Martin*, 7 Barb. 297.

<sup>60</sup> Post, §§ 140, 141.

<sup>61</sup> *Munson v. Mallory*, 36 Conn. 165; *O'Neill v. Armstrong*, 17 Phil. 273; and see *Carter v. Chicago*, 57 Ill. 283; *Chicago v. Wright*, 67 Ill. 318; *Commonwealth v. Borough of Beaver*,

171 Pa. St. 542, 33 Atl. Rep. 112. So where a street was so improved as to leave a space for grass and sidewalk on one side and only for sidewalk on the other, it was held a person on the latter side could not recover damages. *English v. Danville*, 170 Ill. 131, S. C. 69 Ill. App. 288. But where the sidewalk was removed and the curb placed on the street line it was held the abutter was entitled to damages. *Narchold v. Westport*, 71 Mo. App. 508.

<sup>62</sup> *Kreigh v. Chicago*, 86 Ill. 407; *People v. Walsh*, 96 Ill. 232; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. Rep. 758; and see *Simon v. Northrup*, 27 Or. 488, 40 Pac. Rep. 560.

<sup>63</sup> Ante, §§ 91e-91l. "Every



private rights are entirely distinct from the public right or easement, subordinate to it, but not dependent upon it.<sup>64</sup> Consequently, the public may abandon its rights without impairing the private easement.<sup>65</sup> The power to vacate streets is as indisputable as the power to establish them, and is one of the powers usually conferred upon municipal corporations. But this power extends only to the public easement. A street cannot be closed so as to prevent access

owner of ground on any street in Lexington, has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right the legislature cannot deprive him, without his consent, or a just compensation in money." *Transylvania University v. Lexington*, 3 B. Mon. 25, 27; and see to same effect: *Anderson v. Turbeville*, 6 Coldw. 150; *Kellinger v. Forty-Second Street R. R. Co.*, 50 N. Y. 206; *Field v. Barling*, 149 Ill. 556, 37 N. E. Rep. 850, 10 Am. R. R. & Corp. Rep. 707; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. Rep. 141; *Gargon v. Louisville etc. R. R. Co.*, 89 Ky. 212, 12 S. W. Rep. 259; *Bannon v. Rohmeiser*, 90 Ky. 48, 13 S. W. Rep. 444; *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. Rep. 687; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. Rep. 448; *Pearsall v. Board of Supervisors*, 74 Mich. 558, 42 N. W. Rep. 77; *Johnsen v. Old Colony R. R. Co.*, 18 R. I. 642, 29 Atl. Rep. 594; *In re Nelson street*, 182 Pa. St. 397.

<sup>64</sup> Same. But some of the cases

hold that there are no private rights of way or access in a public highway, and that where private rights have existed they are merged in the public easement when the public way is established by acceptance or otherwise. *Levee District No. 9 v. Farmer*, 101 Cal. 178, 35 Pac. Rep. 569; *Cole v. Shannon*, 1 J. J. Marsh, 218; *Bailey v. Culver*, 84 Mo. 531; *Dodge v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 351, 11 Atl. Rep. 751, affirmed 45 N. J. Eq. 366, 19 Atl. Rep. 622; *State (Kean, Pros.) v. City of Elizabeth*, 54 N. J. L. 462, 24 Atl. Rep. 495, affirmed, 55 N. J. L. 337, 26 Atl. Rep. 939.

<sup>65</sup> A mere legislative act by a city council, vacating a street, leaves the abutter's private rights unaffected, and the legislative act of vacation does not impose any liability on the city. *Hellscher v. Minneapolis*, 46 Minn. 529, 49 N. W. Rep. 287, 5 Am. R. R. & Corp. Rep. 115. And see *Meredith v. Sayre*, 32 N. J. Eq. 557; *Matter of Board of Education*, 23 App. Div. N. Y. 173. In case of a vacation, the owner of the fee, being a third party, cannot take possession of the soil for his private use. *Hollaway v. Delano*, 64 Hun, 34, 45 N. Y. St. 891, 18 N. Y. Supp. 704.

to abutting property, without the consent of the owners of such property, or compensation paid.<sup>66</sup> This right of access does not extend beyond the necessity of the case, and, therefore, is limited to so much of the street in front of each proprietor as will afford him a convenient outlet to some

<sup>66</sup> *Transylvania University v. Lexington*, 3 B. Mon. 25, 27; *Anderson v. Turbeville*, 6 Coldw. 150, 157. In the latter case the court say: "The owners of lots bordering upon a public street have an easement of way in the street, in addition to the use of it in common with the people generally. This additional right of way is private property, within the protection of the law, as much as if it were corporeal property, and cannot be taken for public use without just compensation." The following cases also directly support the text: *Pearsall v. Board of Supervisors*, 74 Mich. 558, 42 N. W. Rep. 77; *Egerer v. New York Central & C. R. R. Co.*, 130 N. Y. 108, 29 N. E. Rep. 95, 5 Am. R. R. & Corp. Rep. 241; *Hollaway v. Delano*, 64 Hun, 34, 45 N. Y. St. 891, 18 N. Y. Supp. 704; *Strader v. Cincinnati*, 1 Handy, 446; *Hiller v. Railroad Co.*, 28 Kan. p. 628; *World's Columbian Exposition v. Brennan*, 51 Ill. App. 128; *Heinrich v. City of St. Louis*, 125 Mo. 424, 28 S. W. Rep. 626. The last two cases were under constitutions which gave compensation for property damaged as well as taken. The contrary is maintained by several courts of high repute, *Levee District v. Farmer*, 101 Cal. 178, 35 Pac. Rep. 569; *Ellsworth v. Chickasaw County*, 40 Ia. 571; *Barr v. City of Oskaloosa*, 45 Ia. 275; *Herbert v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 21. See also *Paul v. Carver*, 24 Pa. St. 207; *Hare v. Rice*, 142 Pa. St. 608, 21 Atl. Rep. 976; *Fesser v. Acherbach*, 29 Ill. App. 373. In *Barr v. City of Oskaloosa*, 45 Ia. 275, the plaintiff owned two lots upon Kossuth street, in Oskaloosa. The lots and street were platted by one White. The fee of the street was in the public, the reversion in White. The plaintiff's lots were improved, at an expense of several thousand dollars, with dwellings occupied by tenants. The Central Railroad Company procured a quitclaim from White, of Kossuth street, secured from the City Council an ordinance vacating the street, and then proceeded to cut down the grade six feet and fill it with railroad tracks constructed and used in such manner as to prevent access to the plaintiff's premises and preclude all travel on the street by the plaintiff or the public. The value of plaintiff's property was almost wholly destroyed. In a suit against the city and railroad company the plaintiff set up the foregoing facts, the defendants demurred, and the demurrer was sustained. It was held that, on vacation of the street, the title vested in the railroad company under its deed from White, that plaintiff ceased to have any

connecting street.<sup>67</sup> Consequently, when part of a street is vacated, those whose property does not abut upon the vacated portion and who have access to their property by

rights in the soil of the street, and could no more complain of the building of the railroad upon it than he could if it had been built on an adjacent lot. In *Egerer v. New York Central etc. R. R. Co.*, 130 N. Y. 108, 29 N. E. Rep. 95, 5 Am. R. R. & Corp. Rep. 241, the facts were very similar, except that it did not appear how the street was established and it was held that the abutter had rights of light, air and access, which could not be destroyed or materially impaired without compensation. In *Holloway v. Delano*, 64 Hun, 34, 45 N. Y. St. 891, 18 N. Y. Supp. 704, the owner of the fee of a vacated street sought to claim it for his own use. The origin of the street was the same as in the Iowa case. The court says: "That an owner of land does acquire an interest in a street abutting on his property where the conveyance of such property to such owner bounds the property by the street, and where the grantor owned the fee of the street, even though the conveyance excludes the fee of the street, separate and distinct from the right of the public to use the street as a public road or highway, is clear upon principle, and is settled by authority; and such right arises from the implied covenant in the deed when it conveys the property bounding it by the street, that there is a street, and that, so far as the property of the owner of the

fee in the street is concerned, such parts of the street as abutted on the property conveyed shall remain open as a street for light, air and right of access to such abutting property. This easement, of course, is subordinate to the right of the public to use the road or highway, as such right the grantor had no power to convey or affect, but is a right that binds and controls the grantor's interest in the street whatever it may be, and gives to the grantee the right to insist that the grantor, or those claiming under him, shall not so use his interest in the street as to interfere with this right or easement acquired by the implied covenant contained in the grant." See *Attorney General v. Sherry*, 20 R. I. 43, 37 Atl. Rep. 344.

<sup>67</sup> "The extent of this appurtenant right, depending on circumstances, may not, in a particular case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is therefore protected by the fundamental law, as property. But it cannot, as to each proprietor of ground, be co-extensive with all the streets and alleys of the city. As a private right, it must, like that of vicinage, be limited by its own nature and end; that is, chiefly, by the necessity of convenient access to, and outlet from the ground of each proprietor." *Transylvania Univer-*

the remaining portion of the street, cannot complain.<sup>68</sup> This is the prevailing doctrine, but the cases are not uniform and, perhaps, not reconcilable.<sup>69</sup> Where part of a street was closed so as to leave plaintiff fronting on a cul de sac,

*sity v. Lexington*, 3 B. Mon. 25, 27. See also *Pearson v. Allen*, 151 Mass. 79, 23 N. E. Rep. 731.

<sup>68</sup> *Pollack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490; *Chicago v. Union Building Association*, 102 Ill. 379; *Hessing v. Scott*, 107 Ill. 600; *East St. Louis v. O'Flynn*, 119 Ill. 200; *Gray v. Iowa Land Co.*, 26 Ia. 387; *Brady v. Shinkle*, 40 Ia. 576; *Dempsey v. Burlington*, 66 Ia. 687; *Heller v. Atchison, T. & S. F. R. R. Co.*, 28 Kan. 622, 625; *Castle v. County of Berkshire*, 11 Gray, 26; *People v. Supervisors*, 20 Mich. 95; *Petition of Concord*, 50 N. H. 530; *Commissioners of Coffey County v. Venard*, 10 Kan. 95, 100; *Kings County Fire Ins. Co. v. Stevens*, 101 N. Y. 411; *McGee's Appeal*, 114 Pa. St. 470; *Bailey v. Culver*, 12 Mo. App. 175; *Whitsett v. Union Depot etc. Co.*, 10 Col. 243; *Commissioners v. Quinn*, 136 Ill. 604, 27 N. E. Rep. 186; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. Rep. 473, S. C. 41 Ill. App. 74; *Dantzer v. Indianapolis Union R. R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 11 Am. R. R. & Corp. Rep. 249; *Sawyer v. Meyer*, 45 Ia. 152; *City of Belleville v. Hallowell*, 41 Kan. 192, 21 Pac. Rep. 105; *Arnold v. Welker*, 55 Kan. 510, 40 Pac. Rep. 901; *Davis v. County Comrs.*, 153 Mass. 218, 26 N. E. Rep. 848; *Stanwood v. City of Malden*, 157 Mass. 17, 31 N. E. Rep. 702; *Nichols v. Inhabitants*

of Richmond, 162 Mass. 170, 38 N. E. Rep. 501; *Kimball v. Homan*, 74 Mich. 699, 42 N. W. Rep. 167; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. Rep. 829, 9 Am. R. R. & Corp. Rep. 173; *State v. Holman*, 40 Minn. 369, 41 N. W. Rep. 1073; *Bailey v. Culver*, 84 Mo. 531; *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. Rep. 743, 5 Am. R. R. & Corp. Rep. 192; *Dodge v. Pennsylvania*, 43 N. J. Eq. 351, 11 Atl. Rep. 751, S. C. affirmed 45 N. J. Eq. 366, 19 Atl. Rep. 622; *State v. City of Elizabeth*, 54 N. J. L. 462, 24 Atl. Rep. 495; *In re Melon St.* 1 Pa. Supr. Ct. 63; *Gay and Wests Sts.*, 7 Pa. Co. Ct. 217; *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. Rep. 913, 47 Pac. Rep. 453; *Cherry v. Rock Hill*, 48 S. C. 553; *Symons v. San Francisco (Cal.)*, 42 Pac. Rep. 913; *Leavenworth v. Douglass*, 59 Kan. 416.

<sup>69</sup> *Gargan v. Louisville etc. R. Co.*, 89 Ky. 212, 12 S. W. Rep. 259; *Bannon v. Rohmeister*, 90 Ky. 48, 13 S. W. Rep. 444; *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. Rep. 608; *Town of Lake v. Burcky*, 57 Ill. App. 547, S. C. affirmed, 158 Ill. 103; *Horton v. Williams*, 99 Mich. 423, 58 N. W. Rep. 369. In the case of *In re Nelson Street*, 182 Pa. St. 397, the question arose under a statute which gave compensation for any loss occasioned the owner of land by the vacation of a street. The contention was that the statute only applied to property

abutting on the vacated part. The reasoning of the court will apply to all cases where the right to compensation is conceded to exist. "Where the part of a street in front of a property is vacated the owner's right to compensation is conceded, but the right is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered comparatively worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover, at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of the right would deny him compensation if all of the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right no distinction can be drawn between a partial and a total deprivation of access; the impairment of the right is a legal injury differing in degree only from its total destruction. If the street is vacated on both sides of his property so as to cut him off from other streets, his means of access is as effectually destroyed as if the entire street were vacated. If the street is vacated

on one side only and his property is left at the end of a cul-de-sac; if the street is decreased in width, so as to be impassable to vehicles; or if one means of access is taken away by closing a back street or alley, his injury may be less, but the difference is one of degree only. In either case he has sustained a loss by the destruction of an important element in the market value of his property, and he has been injured in a legal sense. \* \* \* The difficulty in defining the limits when the right to compensation shall end cannot be urged as a valid objection to the claims of appellants. To entitle the owner of land to recover the loss must be one which he as owner has suffered by reason of the depreciation in value of his land. The basis of his claim for compensation is that his land has been lessened in value, not that he has suffered in common with others or to a greater extent than others because of something peculiar to himself. The difficulty of assessing damages is no greater than that which a jury meets in all such cases in ascertaining the extent to which properties in the vicinity have been benefited and in making assessments therefor. To sustain the right of a claimant to compensation because of the vacation of a street it must appear that the loss results from the depreciation in value of his land because of the change in the street, and his loss must be direct and proximate, and so obvious and substantial as to admit of calculation." Pp. 403-6.

it was held he was entitled to compensation.<sup>70</sup> It has been held that the vacation and closing of one street afforded no ground of complaint when access remained by other streets,<sup>71</sup> but the contrary has been ruled in recent cases.<sup>72</sup>

It has been held that a highway cannot be discontinued during the pleasure of the authorities, reserving the right to open it again without paying any damages,<sup>73</sup> also that a city could not vacate a street for twenty years, during which it was to be put to private use;<sup>74</sup> also that a street

<sup>70</sup> *Johnsen v. Old Colony R. R. Co.*, 18 R. I. 642, 29 Atl. Rep. 594; *Goss v. Highway Commissioners*, 63 Mich. 698, 30 N. W. Rep. 197. But see *Davis v. County Comrs.*, 153 Mass. 218, 26 N. E. Rep. 848; *Montreal v. Drummond*, L. R. 1 H. L. 384.

<sup>71</sup> *Fearing v. Irwin*, 55 N. Y. 486; *Coster v. Mayor*, 43 N. Y. 399; *Smith v. Boston*, 7 Cush. 254; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. Rep. 829, 9 Am. R. R. & Corp. Rep. 173.

<sup>72</sup> *Heinrich v. City of St. Louis*, 125 Mo. 424, 28 S. W. Rep. 626; *Louisville & N. R. R. Co. v. Finley*, 86 Ky. 294, 5 S. W. Rep. 753; and see *Lindsay v. City of Omaha*, 30 Neb. 512, 46 N. W. Rep. 627. In the first case the plaintiff's lot was on a corner, one of the streets was vacated, but it was held he could recover. The court says: "It is suggested that the plaintiff may still use his half of the vacated portion of the street in front of his lot—that is to say, a strip 30 feet wide, extending along the north end of his lot from Taylor avenue—as a private way, if he desires to do so. This he may do

beyond all doubt; but it is no answer to this complaint. The thing of which he has been deprived for the public good is direct access to a public highway, not simply to a private way. The most casual observation will show that the value of these small parcels of land in cities depends upon the fact that they abut on a public thoroughfare. It is this which gives them so much value. Nor does the fact that plaintiff has direct access to his property from Taylor avenue and the alley defeat this action. The fact that he has such access is one to be considered in estimating the damages to be awarded, for it is manifest that the damages are not as great as they would be if the property had no side street. But the plaintiff is still entitled to recover whatever damages he sustained by the vacation of the street. This is too clear to call for further observation."

<sup>73</sup> *Cheshire Turnpike v. Stevens*, 10 N. H. 133.

<sup>74</sup> *Glasgow v. St. Louis*, 87 Mo. 678, affirming S. C. 15 Mo. App. 112.

could not be narrowed without compensation to those abutting thereon.<sup>75</sup>

When a street is vacated and the public right thereby abandoned, the soil necessarily passes to private parties. But this does not necessarily make the vacation for a private purpose.<sup>76</sup> In many cases the vacation was apparently made in order that the street might be occupied for railroad purposes,<sup>77</sup> or used for a private building or manufactory,<sup>78</sup> or other private advantage,<sup>79</sup> but in nearly all the cases the vacation was sustained, the question of the vacation being made for a private purpose not being raised or else decided adversely. Whether the motives of local bodies, acting in a legislative capacity, and on a subject within their powers, can be inquired into judicially, presents a serious question.<sup>80</sup> In some cases vacations have been declared void because made for a private purpose and not for the public good, but the motives of the council

<sup>75</sup> *Rensselaer v. Leopold*, 106 Ind. 29; *Lawrence v. Mayor etc. of New York*, 2 Barb. 577; *City of Mt. Carmel v. Bell*, 52 Ill. App. 427; *City of Mt. Carmel v. Shaw*, 52 Ill. App. 429; *Compare Williams v. Casey*, 73 Ia. 194, 34 N. W. Rep. 813; *contra*, *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. Rep. 82.

<sup>76</sup> *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. Rep. 473. See *Louisville v. Bannon*, 99 Ky. 74, 35 S. W. Rep. 120.

<sup>77</sup> *Whitsett v. Union Depot Co.*, 10 Col. 243; *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 39 N. E. Rep. 223, 11 Am. R. R. & Corp. Rep. 249; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. Rep. 829, 9 Am. R. R. & Corp. Rep. 173; *Dodge v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 351, 11 Atl. Rep. 751, affirmed, 45 N. J. Eq. 366, 19 Atl.

Rep. 622; *In re Melon St.*, 1 Pa. Supr. Co. 63.

<sup>78</sup> *Bannon v. Rohmeiser*, 90 Ky. 48, 13 S. W. Rep. 444; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. Rep. 473; *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. Rep. 743, 5 Am. R. R. & Corp. Rep. 192; *Bailey v. Culver*, 84 Mo. 531; *State v. City of Elizabeth*, 54 N. J. L. 462, 24 Atl. Rep. 495, affirmed, 55 N. J. L. 337, 26 Atl. Rep. 939.

<sup>79</sup> *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. Rep. 651.

<sup>80</sup> The question arose in *State v. City of Elizabeth*, 54 N. J. L. 462, 24 Atl. Rep. 495, and the court disposed of it as follows: "Nor do I find any substance in, the point that the vacation was made to subserve a private interest. It is true that the proceedings for vacation were taken

were capable of being inferred from the face of the proceedings.<sup>81</sup>

Where the vacation of a street was procured by a county for the purpose of erecting public buildings thereon, whereby a drain belonging to a city was destroyed, it was held the city was entitled to compensation.<sup>82</sup> Where an ordinance immediately after a petition for such vacation had been presented by the trustees of the Trumbull estate. The vacated portion of the street had been laid over the Trumbull lands. There appears to have been an opportunity to sell a tract of said land to a company which would locate extensive works upon it, and so increase the prosperity of that portion of the city. The required piece of land could not have been obtained without a vacation of this part of York street. This was probably the principal inducement to the action of the common council. But the motives which induce municipal proceedings of this kind are always of a mixed character. Regard for private interests are necessarily intertwined with public interests. The size of lots for building purposes is a proper factor to be taken into consideration in the vacation of, as well as in laying out or altering, streets. If the motive of a common council in exercising the power conferred upon it by the legislature can ever be questioned is doubtful. If the courts can enter into the motives of the municipal legislature in respect to acts of this kind in any case, it must be one in which the public interests have been glaringly sacrificed to subserve private ends. Nothing of this sort ap-

pears in this case. The vacated portion of the street runs through salt meadows, and crosses an unbridged creek, and there is not a house or building along the line of it. Between the property of the prosecutrix and the vacated part of the street, York street is crossed by Schiller street, which is open and built upon. Under all the circumstances, the action of the common council is not properly the subject of a suspicion of being influenced by any considerations other than to conserve the best interests of the city." This case was affirmed in 55 N. J. L. 337, 26 Atl. Rep. 939. See also ante §§ 100b, 121a, and *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. Rep. 651.

<sup>81</sup> *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. Rep. 608; *Horton v. Williams*, 99 Mich. 423, 53 N. W. Rep. 369; *City of Mt. Carmel v. Bell*, 52 Ill. App. 427; *City of Mt. Carmel v. Shaw*, 52 Ill. App. 429; *Lawrence v. Mayor etc. of New York*, 2 Barb. 577; *People v. Comrs.*, 53 Barb. 70. Compare *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. Rep. 473; *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. Rep. 743, 5 Am. R. & Corp. Rep. 192; *State v. City of Elizabeth*, 54 N. J. L. 462, 24 Atl. Rep. 495.

<sup>82</sup> *Cincinnati v. Hamilton County*, 1 Disney, 5.



ance for the building of a viaduct over railroad tracks vacates the part of the street to be occupied by approaches, it thereby defeats its main object and will be void.<sup>83</sup>

**134a. Statutory authority to vacate streets. Exercise and construction thereof.**—Streets and highways cannot be vacated, unless there is legislative authority therefor, and if a mode is provided by which vacation can be made, they cannot be vacated in any other mode.<sup>84</sup> Under a statute which provides that any alley or highway which has become useless may be vacated, a part of a street which has become useless may be vacated.<sup>85</sup> A statute provided that a road which had been laid out and "opened in part," could be vacated; held that the statute would apply if 84 feet had been opened and made fit for travel.<sup>86</sup> The statutory authority must be substantially complied with as to petition, notice and procedure generally, or the attempted vacation will be ineffectual.<sup>87</sup> Where a statute provided

<sup>83</sup> *Read v. City of Camden*, 54 N. J. L. 347, 24 Atl. Rep. 549, reversing S. C. 53 N. J. L. 322, 21 Atl. Rep. 565.

<sup>84</sup> *Miller v. Town of Corinna*, 42 Minn. 391, 44 N. W. Rep. 127; *Town of Cromwell v. Brown Stone Quarry Co.*, 50 Conn. 470; *Louisville v. Bannon*, 99 Ky. 74, 35 S. W. Rep. 120; *Moffit v. Brainard*, 92 Ia. 122, 60 N. W. Rep. 223.

<sup>85</sup> *In re Swanson street*, 163 Pa. St. 323, 30 Atl. Rep. 207.

<sup>86</sup> *Union Township Road*, 10 Pa. Co. Ct. 433.

<sup>87</sup> *Hayes v. Tyler*, 85 Ia. 126, 52 N. W. Rep. 116; *Devoe v. Smeltser*, 86 Ia. 385, 53 N. W. Rep. 287; *Harris v. Board of Supervisors*, 88 Ia. 219, 55 N. W. Rep. 324; *Mills v. Board of Comrs.*, 50 Kan. 635, 32 Pac. Rep. 361; *Martin v. City of Louisville (Ky.)*, 29 S. W. Rep. 864; *Goss v. Highway Commissioner*, 63 Mich.

608, 30 N. W. Rep. 197; *Price v. Stagra*, 68 Mich. 17, 35 N. W. Rep. 815; *Davis v. Board of Supervisors*, 89 Mich. 295, 50 N. W. Rep. 862; *Curry v. Rosell*, 99 Mich. 524, 58 N. W. Rep. 472; *Miller v. Town of Corinna*, 42 Minn. 391, 44 N. W. Rep. 127; *Nicholson v. Stockett, Walker*, Miss., 67; *In re Big Hollow Road*, 111 Mo. 326, 19 S. W. Rep. 947; *Latimer v. Tillamook County*, 22 Or. 291, 29 Pac. Rep. 734; *Road in Ross Township*, 36 Pa. St. 87; *Chartier's Township Road*, 48 Pa. St. 314; *Vacation of Henry Street*, 123 Pa. St. 346, 16 Atl. Rep. 785; *In re Vacation of Union Street*, 140 Pa. St. 525, 21 Atl. Rep. 406; *In re Vacation of Public Road*, 160 Pa. St. 104, 28 Atl. Rep. 649; *In re Swanson St.*, 163 Pa. St. 323, 30 Atl. Rep. 207; *Matter of Vacation of Certain Streets*, 17 Phil.

that a city should not vacate a street "when objected to by property owners adjacent thereto or by those having a direct or substantial interest therein," it was held that one just outside of the city limits, at whose land the street terminated, was not within the statute, and consequently could not defeat the vacation by objecting.<sup>88</sup> Under some statutes a road may be discontinued before it has been actually opened.<sup>89</sup> In many States compensation to those damaged by the vacation is required to be made by statute.<sup>90</sup> An alteration of a highway is held to work a discontinuance of such parts of the old way as are not included in the new location.<sup>91</sup>

660; Union Township Road, 10 Pa. Co. Ct. 433; Yates v. West Grafton, 33 W. Va. 507, 11 S. E. Rep. 8; Pettibone v. Hamilton, 40 Wis. 402; James v. City of Darlington, 71 Wis. 173, 36 N. W. Rep. 834.

<sup>88</sup> House v. Greensburg, 93 Ind. 533. As to who are parties "interested" in case of a vacation, or who are entitled to notice or to object see Commissioners of Highways v. Quinn, 136 Ill. 604, 27 N. E. Rep. 186; Brandenburg v. Hittel (Ind.), 37 N. E. Rep. 329; Gay & West Streets, 7 Pa. Co. Ct. 217; Roxedale v. Seip, 32 La. An. 435; State v. Snedeker, 30 N. J. L. 80; Kimball v. Homan, 74 Mich. 699, 42 N. W. Rep. 167; Arnold v. Welker, 55 Kan. 510, 40 Pac. Rep. 901; Llimming v. Barnett, 134 Ind. 332, 33 N. E. Rep. 1098; Bradbury v. Walton, 94 Ky. 163, 21 S. W. Rep. 669; Bandistal v. Mich. Cent. R. R. Co., 113 Mich. 687, 71 N. W. Rep. 1114.

<sup>89</sup> Millett v. County Comrs., 80 Me. 427, 15 Atl. Rep. 24; Seuter v. Pugh, 9 Gratt. 260. But see Webb v. Town of Rocky Hill, 21 Conn. 468.

<sup>90</sup> Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. Rep. 473; Butterworth v. Bartlett, 50 Ind. 537; Cook v. Quick, 127 Ind. 477, 26 N. E. Rep. 1007; Hicks v. Ward, 69 Me. 436; In re Township of Mariposa, 25 U. C. C. P. 133; In re Nelson Street, 182 Pa. St. 397; Chicago v. Baker, 86 Fed. Rep. 753; Matter of New York, 28 App. Div. N. Y. 143. See Grove v. Allen, 92 Ia. 519, 61 N. W. Rep. 175. When a street may be vacated on petition of abutting owners to a court, the municipality is not entitled to compensation. In re Alber's Petition, 113 Mich. 640, 71 N. W. Rep. 1110.

<sup>91</sup> Commonwealth v. Boston & A. R. R. Co., 150 Mass. 174, 22 N. E. Rep. 913; City and County of San Francisco v. Burr, 108 Cal. 460, 41 Pac. Rep. 482.

## CHAPTER VI.

### OTHER CASES OF TAKING.

§ 135. **Impairing franchises.**—A franchise may be defined as a privilege or authority vested in certain persons by grant of the sovereign, to exercise powers or to do and perform acts which without such grant they could not do or perform.<sup>1</sup> The right to construct, maintain and operate a toll-bridge, ferry, turnpike, railroad, canal and the like is a franchise, which must emanate directly or indirectly from the sovereign power.<sup>2</sup> The property in connection with which the franchise is made available, and the franchise itself, are of course, subject to the power of eminent domain like all other property.<sup>3</sup> When a part of the property or the whole property and franchise are taken for public use there is no doubt as to the nature of the act or the right to compensation.<sup>4</sup> But toll-bridges, ferries, turnpikes, rail-

<sup>1</sup> Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co., 11 Leigh (Va.) 42; Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. Rep. 1083.

<sup>2</sup> Dyer v. Tuskaloosa Bridge Co., 2 Porter (Ala.) 296; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 63; Binghamton Bridge, 3 Wall. 51, 81; Chicago City R. R. Co. v. People, 73 Ill. 541; Lytle v. Breckenridge, 3 J. J. Marsh. 663; McRoberts v. Washburne, 10 Minn. 23; New York v. Starin, 106 N. Y. 1.

<sup>3</sup> La Fayette Plank Road Co. v. New Albany & Salem R. R. Co., 13 Ind. 90; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40, 454; State v. Noyes, 47 Me. 189; White River

Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Brainard v. Missisquoi R. R. Co., 48 Vt. 107; West River Bridge Co. v. Dix, 6 How. 507, 543; Powell v. Sammon, 31 Ala. 552; Ft. Wayne L. & I. Co. v. Maumee Avenue Gravel R. R. Co., 132 Ind. 80, 30 N. E. Rep. 880; McRoberts v. Washburne, 10 Minn. 23; New York v. Starin, 106 N. Y. 1; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. Rep. 983. The legislature may repeal the charter of a corporation, where the right to do so is reserved, and may authorize a new company to take any of the property of the old upon making compensation. Greenwood v. Freight Co., 105 U. S. 13.

<sup>4</sup> Matter of Flatbush Avenue, 1

roads and the like are often very seriously injured by the construction of competing lines which draw away patronage and impair the value of the franchise. The question arises under what circumstances, if at all, the owners of the franchise so impaired may claim compensation, as a matter of constitutional right.

§ 136. **When the franchise is not exclusive.**—The grant of a franchise may be exclusive, or the grant may be silent in that respect. A toll-bridge or ferry is often granted with a provision that no other bridge or ferry shall be erected within a certain distance above or below the one granted, and this exclusiveness may be limited or unlimited in its duration. So a railroad, turnpike, canal or other means of travel or communication may be granted between two points with a proviso excluding any similar grant. As all grants by the sovereign are construed in favor of the sovereign, the grant of a franchise will not be deemed exclusive unless so expressed.<sup>5</sup> Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a taking of the former franchise which entitles its owner to compensation. This principle was settled in the

Barb. 286; Seneca Road Co. v. Auburn & Rochester R. R. Co., 5 Hill 170; Boston Water Power Co. v. Boston & W. R. R. Co., 23 Pick. 360; Matter of Hamilton Avenue, 14 Barb. 405; Chicago General R. R. Co. v. Chicago City R. R. Co., 62 Ill. App. 502. See post, § 136, note 8.

<sup>5</sup> *Janesville Bridge Co. v. Stoughton*, 1 Pinney, 667; *Lake v. Virginia & Truckee R. R. Co.*, 7 Nev. 294; *Johnson v. Crow*, 87 Pa. St. 184; *Power v. Village of Athens*, 99 N. Y. 592; *S. C. 26 Hun* \*282; *Town of Golconda v. Field*, 108 Ills. 419; *Crowder v.*

*Town of Sullivan*, 128 Ind. 486, 28 N. E. Rep. 94; *City of Rushville v. Rushville Nat. Gas Co.*, 132 Ind. Rep. 575, 28 N. E. Rep. 853; *North Baltimore Pass. R. R. Co. v. Baltimore*, 75 Md. 247, 23 Atl. Rep. 470; *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381; *In re City of Brooklyn*, 143 N. Y. 596, 38 N. E. Rep. 983, affirming *S. C. 73 Hun* 499, 26 N. Y. Supp. 198; *Mills v. St. Clair County*, 8 How. 569; *Thompson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep. 723.

leading case of *Charles River Bridge v. Warren Bridge*,<sup>6</sup> and has been confirmed by numerous decisions.<sup>7</sup> Of course,

<sup>6</sup> 7 Pick. 344; affirmed in 11 Pet. 420.

<sup>7</sup> *Janesville Bridge Co. v. Stoughton*, 1 Pinney 667; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. In the latter case plaintiff had a toll-bridge across the Mohawk River, and defendant erected a free bridge within forty-nine feet of it, the effect of which was totally to destroy the value of the plaintiff's franchise. It was held that the plaintiff was without remedy. *Sommerville v. Wimbush*, 7 Gratt. 205; *Day v. Stetson*, 8 Me. 365; *State v. Noyes*, 47 Me. 189; *Piatt v. Covington & Cincinnati Bridge Co.*, 8 Bush. 31; *Dyer v. Tuskaloosa Bridge Co.*, 2 Porter (Ala.) 296; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *Bartram v. Central Turnpike Co.*, 25 Cal. 283; *Phelps v. Parish of Morehouse*, 12 La. An. 649; *Washington & Balt. Turnpike Road v. Balt. & Ohio R. R. Co.*, 10 G. & J. 392; *Salem & Hamburg Turnpike Co. v. Town of Lyme*, 18 Conn. 451; *La Fayette Plank Road Co. v. New Albany & Salem R. R. Co.*, 13 Ind. 90; *Balt. & Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 224; *East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ills. 265; *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381; *Empire City Subway Co. v. Broadway etc. R. R. Co.*, 87 Hun 279, 33 N. Y. Supp. 1055; *Long v. City of Duluth*, 49 Minn. 280, 51

N. W. Rep. 913; *Bridgewater Ferry Co. v. Sharon Bridge Co.*, 145 Pa. St. 404, 22 Atl. Rep. 1039; *Hydes Ferry Turnpike Co. v. Davidson County*, 91 Tenn. 291, 18 S. W. Rep. 626; *Thompson-Houston El. Co. v. City of Newton*, 42 Fed. Rep. 723; *Kansas etc. R. R. Co. v. Payne*, 49 Fed. Rep. 114, 1 C. C. A. 183; *State ex rel. v. City of Hamilton*, 47 Ohio St. 52, 23 N. E. Rep. 935, 2 Am. R. R. & Corp. Rep. 60; *City of Houston v. Houston City R. R. Co.*, 83 Tex. 548, 19 S. W. Rep. 127, 6 Am. R. R. & Corp. Rep. 106; *Hamilton G. & C. Co. v. City of Hamilton*, 146 U. S. 258, 13 S. C. Rep. 90, 7 Am. R. R. & Corp. Rep. 76; *General Elec. R. R. Co. v. Chicago City R. R. Co.*, 66 Ill. App. 362.

It makes no difference that the State itself is largely interested in the management and profits of the new enterprise. *Turnpike Co. v. State*, 3 Wall. 210; *New York & Harlem R. R. Co. v. Forty-second Street R. R. Co.*, 50 Barb. 285; *affd. same*, p. 309; *S. C. 26 How. Pr. 63*; *Brooklyn City etc. R. R. Co. v. Coney Island etc. R. R. Co.*, 35 Barb. 364; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh, 42; *Illinois & Michigan Canal v. Chicago & Rock Island R. R. Co.*, 14 Ill. 314; *Matter of Hamilton Avenue*, 14 Barb. 405; *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 599. *Contra*: *Newburg Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *Franklin & Columbia Turnpike*

if any property is taken, compensation must be made.<sup>8</sup> A licensed bridge or ferry, though having no exclusive right, will be protected from competition by an unlicensed bridge or ferry.<sup>9</sup>

§ 137. **When the franchise is exclusive.**—When the grant of a franchise is exclusive, this is but a circumstance which increases its value without changing its essential character. It is still property, and subject to the power of eminent domain.<sup>10</sup> The power to take a franchise for pub-

Co. v. County Court, 8 Humph. 342; Hall v. Ragsdale, 4 Stew. & Porter 252; and see Hudson etc. Del. Canal Co. v. N. Y. & Erie R. R. Co., 9 Paige 323.

<sup>8</sup> Matter of Flatbush Avenue, 1 Barb. 286; Seneca Road Co. v. Auburn & Rochester R. R. Co., 5 Hill 170; La Fayette Plank R. Co. v. New Albany & Salem R. R. Co., 13 Ind. 90; Baltimore etc. Co. v. Union R. R. Co., 35 Md. 224; Moses v. Sanford, 11 Lea (Tenn.) 731; Pittsburgh & Lake Erie R. R. Co. v. Jones, 111 Pa. St. 204.

<sup>9</sup> Carroll v. Campbell, 108 Mo. 550, 17 S. W. Rep. 884; Catawba Toll Bridge Co. v. Flowers, 110 N. C. 381, 14 S. E. Rep. 918.

<sup>10</sup> Post, §§ 274, 275; Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396; Salem & Hamburg Turnpike Co. v. Lyme, 18 Conn. 451; Piscataqua Bridge Co. v. N. H. Bridge Co., 7 N. H. 35; La Fayette Plank Road Co. v. New Albany & Salem R. R. Co., 13 Ind. 90; Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray, 1; Boston Water Power Co. v. Boston & W. R. R. Co., 23 Pick. 360; Philadelphia & Gray's Ferry Passenger Ry. Co.'s Appeal, 102 Pa. St. 123.

There is no doubt as to the power of the legislature to grant, or to authorize the granting, of exclusive privileges and franchises, when the same is not forbidden by the constitution. Livingston v. Van Ingen, 9 Johns. 507, 573; Slaughter House Cases, 16 Wall. 66; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Note to Ford v. Chicago Milk Shippers' Assn., 11 Am. R. R. & Corp. Rep. 433, 448.

Where the constitution prohibits the granting of exclusive rights, privileges and immunities an exclusive ferry privilege cannot be granted. Carroll v. Campbell, 110 Mo. 557, 19 S. W. Rep. 809. Municipal corporations cannot grant exclusive franchises unless expressly authorized so to do. Montgomery Gas Light Co. v. City Council, 87 Ala. 245, 6 So. Rep. 113; Citizens' Gas etc. Co. v. Elwood, 114 Ind. 332; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. Rep. 94; City of Newport v. Newport Light Co., 84

lic use will be discussed in a subsequent chapter.<sup>11</sup> The question now is, what impairment of its value or interference with its exercise or enjoyment will amount to a taking. In so far as it is exclusive, it will be protected by the law. The exclusive right is property, which cannot be interfered with, except for public use and upon just compensation made.<sup>12</sup> The exercise of a rival franchise within the express terms of the grant is a taking, and may be enjoined unless compensation is provided.<sup>13</sup> An act granting a franchise is a contract between the grantee and the State, and any subsequent act impairing its obligation is void.<sup>14</sup> If the original grant is not exclusive, but is made exclusive by a subsequent act without any consideration, such subsequent act is not binding upon the State and may be disregarded.<sup>15</sup> It is otherwise if there is a consideration for such subsequent act.<sup>16</sup> An exclusive franchise or privilege

Ky. 166; Long v. City of Duluth, 49 Minn. 280, 51 N. W. Rep. 913; State v. Cincinnati Gas Co., 18 Ohio St. 262; Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & G. Co., 33 Fed. Rep. 659; Meadville Nat. Gas Co. v. Meadville Fuel Gas Co., 1 Pa. Co. Ct. 448; Jackson County H. R. R. Co. v. Inter-State Rapid Transit Ry. Co., 24 Fed. Rep. 306; and St. Louis Gas Light Co. v. St. Louis Gas, Fuel & Power Co., 16 Mo. App. 52; 11 Am. R. R. & Corp. Rep., p. 463, and cases cited. The granting of an exclusive ferry franchise is not a taking of the property of those on the banks of the stream above or below. Murray v. Mefee, 20 Ark. 561. In State v. Tower, 84 Me. 444, 24 Atl. Rep. 898, it was held that the State could grant an exclusive privilege of fishing within the waters of the State whether tidal or interior.

<sup>11</sup> Post, §§ 274, 275.

<sup>12</sup> Piscataqua Bridge Co. v. N. H. Bridge Co., 7 N. H. 35.

<sup>13</sup> St. Louis R. R. Co. v. N. W. St. Louis Ry. Co., 69 Mo. 65; Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray 1; Piscataqua Bridge Co. v. N. H. Bridge Co., 7 N. H. 35; Binghamton Bridge, 3 Wall. 51; Power v. Village of Athens, 99 N. Y. 592, S. C. 26 Hun 282; and cases cited in following section.

<sup>14</sup> Dartmouth College v. Woodward, 4 Wheat. 625; Binghamton Bridge, 3 Wall. 51; Powell v. Sammon, 31 Ala. 552; Chicago Municipal Gas L. Co. v. Town of Lake, 130 Ill. 42, 22 N. E. Rep. 616.

<sup>15</sup> Johnson v. Crow, 37 Pa. St. 184; Wheeling Bridge Co. v. Wheeling & B. Bridge Co., 34 W. Va. 155, 11 S. E. Rep. 1009; affirmed, 128 U. S. 287, 11 S. C. Rep. 301.

<sup>16</sup> East Hartford v. Hartford

in a matter of public concern can be created only by the sovereign power. It cannot be secured by contract with individuals or corporations. Thus the grant by a railroad company of the exclusive right of maintaining a telegraph line along its right of way,<sup>17</sup> or the grant by an individual of the exclusive right of constructing pipe lines over his land for the transportation of oil is void as against public policy.<sup>18</sup>

§ 138. What is an interference with an exclusive franchise? Bridges and ferries.—The grant of the right to maintain a toll-bridge with a provision that no other bridge or ferry shall be allowed for a certain distance above or below the same, is not violated by the erection of a railroad bridge within the specified limits which is used exclusively for the passage of trains as a part of the general line of the road.<sup>19</sup> In such case there is no taking and no right to compensation. But such grant is, of course, violated by the erection of a bridge for ordinary travel.<sup>20</sup> An exclusive

Bridge Co., 17 Conn. 79, S. C. 16 Conn. 149, 10 How. 511.

<sup>17</sup> Western Union Tel. Co. v. Am. Union Tel. Co., 65 Ga. 160; Baltimore & Ohio Tel. Co. v. Western Union Tel. Co., 24 Fed. Rep. 319; Western Union Tel. Co. v. Burlington etc. R. R. Co., 3 McCrary 130, 11 Fed. Rep. 1; Western Union Tel. Co. v. Am. Tel. Co., 9 Biss. 72; Western Union Tel. Co. v. B. & O. Tel. Co., 19 Fed. Rep. 660; Western Union Tel. Co. v. B. & O. Tel. Co., 23 Fed. Rep. 12; Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. Rep. 493; Mercantile Trust Co. v. Atlantic & P. R. R. Co., 63 Fed. Rep. 910. Contra: Western Union Tel. Co. v. A. & P. Tel. Co., 7 Biss. 367; Canadian Pac. R. R. Co. v. Western Union Tel. Co., 17 Can. Sup. Ct. 151; and see Western

Union Tel. Co. v. Chicago & P. R. R. Co., 86 Ill. 246.

<sup>18</sup> West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600.

<sup>19</sup> Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige 554; Thompson v. New York & Harlem R. R. Co., 3 Sandf. Ch. 625; McRee v. Wilmington R. R. Co., 2 Jones Law, 186; McLeod v. Savannah, Albany & Gulf R. R. Co., 25 Ga. 445; Bridge Co. v. Hoboken Land & Improvement Co., 13 N. J. Eq. 81, affirmed in Court of Errors and Appeals; Same, p. 503, affirmed in Supreme Court of United States, 1 Wall. 116; Lake v. Virginia & Truckee R. R. Co., 7 Nev. 294. Contra: Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40.

<sup>20</sup> Piscataqua Bridge Co. v.



franchise to maintain a ferry will be protected from infringement, and a rival bridge or ferry can only be established by an exercise of the eminent domain power.<sup>21</sup> The grant of an exclusive privilege being in derogation of common right and tending to create monopolies, should receive a strict construction.<sup>22</sup> The grant of "the exclusive right and privilege of building and maintaining a bridge across the Kansas River at the city of Lawrence for the period of twenty-one years," was held not to be violated by the establishment of a ferry at the same place.<sup>23</sup> The converse of this proposition is denied in two cases in which it is held that the exclusive right of maintaining a ferry within certain limits is violated by the erection of a toll-bridge within those limits.<sup>24</sup>

§ 139. **Same: Other franchises.**—While, in the absence of any exclusive right, the construction of free public roads, the effect of which may be to diminish tolls, is not actionable, yet the construction of such roads for the express purpose of enabling the traveling public to avoid toll-gates is

New Hampshire Bridge, 7 N. H. 35; Binghamton Bridge, 3 Wall. 51; Horrell v. Ellsworth, 17 Ala. 576; *Nicon v. Tallahassee Bridge Co.*, 47 Ala. 652; *Kansas etc. R. Co. v. Payne*, 49 Fed. Rep. 114, 1 C. C. A. 183. And see *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Townsend v. Blewett*, 5 How. (Miss.) 503.

<sup>21</sup> *McRoberts v. Washburne*, 10 Minn. 23; *New York v. Starin*, 106 N. Y. 1; *Riverton Ferry Co. v. McKeesport & D. Bridge Co.*, 1 Pa. Supr. Ct. 587. And see *Lindsay v. Lindly*, 20 Ark. 573; *Haynes v. Wells*, 26 Ark. 464; *Gales v. Anderson*, 13 Ill. 413; *Patterson v. Wollmann*, 5 S. D. 608, 67 N. W. Rep. 1040.

<sup>22</sup> *Shorter v. Smith*, 9 Ga. 517; *New York v. Starin*, 106 N. Y. 1; *State v. City of Hamilton*, 47

Ohio St. 52, 23 N. E. Rep. 935, 2 Am. R. R. & Corp. Rep. 60, 67; *Gas Co. v. Parkersburg*, 30 W. Va. 435; *Stein v. Blenville Water Supply Co.*, 34 Fed. Rep. 145; *Emerson v. Commonwealth*, 108 Pa. St. 111; *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. Rep. 913; *Savannah v. Vernon Shell Road Co.*, 88 Ga. 342, 14 S. E. Rep. 610.

<sup>23</sup> *Parrott v. Lawrence*, 2 Dill. 332; see also *Bush v. Peru Bridge Co.*, 3 Ind. 21; and see, in support of the general proposition, *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.

<sup>24</sup> *Gates v. McDaniel*, 2 Stew. 211; and *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; see also *Queen v. Cambrian Ry. Co.*, 40 L. J. Q. B. 169.

an act of bad faith and will be enjoined.<sup>25</sup> The operation of a steam railroad alongside a turnpike is held not to be an unwarrantable interference with the franchise of the turnpike company.<sup>26</sup> A United States mail contractor cannot use a toll road without paying toll, nor could the government itself.<sup>27</sup> The extension of the limits of a city, so as to embrace a toll road, does not deprive the company of the right to take tolls, and such right can only be taken by virtue of the eminent domain power.<sup>28</sup>

Where a railroad is authorized between two places with a provision that no other road shall be authorized between the same places for thirty years, the formation of a continuous line between the two places by an arrangement between three distinct companies is a violation which will be enjoined.<sup>29</sup> The exclusive right of constructing a railroad is not violated by the construction of a horse railway within the specified limits.<sup>30</sup> The exclusive privilege of transporting passengers between certain points is not interfered with by a road for merchandise only.<sup>31</sup> A dummy railroad upon a street was held to be an interference with the exclusive privilege of operating a horse railroad on the same street.<sup>32</sup> But such exclusive privilege is not violated by the construction of another horse railroad on the same street for a short distance only, merely as a connecting link.<sup>33</sup> The city of Des Moines granted to the Des Moines Street R. R. Co. the exclusive right for thirty years to use all

<sup>25</sup> Franklin & Columbia Turnpike Co. v. County Court of Maury, 8 Humph. 342; Hall v. Ragsdale, 4 Stew. & Porter 252; Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291, 18 S. W. Rep. 626.

<sup>26</sup> Bordentown etc. Turnpike Co. v. Camden & Amboy R. R. Co., 17 N. J. L. 314.

<sup>27</sup> Dickey v. Maysville Road Co., 7 Dana 113.

<sup>28</sup> Ft. Wayne L. & I. Co. v. Maumee Ave. Gravel Road Co., 132 Ind. 80, 30 N. E. Rep. 880;

and see Highland Park v. Detroit etc. Road Co., 95 Mich. 489, 55 N. W. Rep. 382.

<sup>29</sup> Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray, 1.

<sup>30</sup> Louisville & P. R. R. Co. v. Louisville City Ry. Co., 2 Duvall, 175.

<sup>31</sup> Richmond etc. R. R. Co. v. Louisa R. R. Co., 13 How. 71.

<sup>32</sup> Denver & S. Ry. Co. v. Denver City Ry. Co., 2 Col. 673.

<sup>33</sup> Street Railway Co. of Grand

the streets of the city for street cars, to be operated by animal power only, with a provision that "the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." It was held that a grant of the right to use the streets for electric cars was no infringement of the first grant.<sup>34</sup> A competing omnibus line will not be allowed to use the track of a horse railroad company;<sup>35</sup> and, although a horse railroad company has no exclusive right in a street, a new company will not be allowed to lay down its tracks so that one rail of the new track will be between the two rails of the old track, without compensation.<sup>36</sup>

It does not seem to have been customary to grant exclusive rights to canal companies. At least no cases appear

*Rapids v. West Side Street Railway Co.*, 48 Mich. 433.

<sup>34</sup> *Teachout v. Des Moines Broad Gauge St. R. R. Co.*, 75 Ia. 722, 38 N. W. Rep. 145. The court says: "It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of thirty years. If so, the establishment of hack-lines or omnibus-lines, or other means of public conveyance, would impair the revenue of the Narrow-Gauge Company, and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means

of street travel. It did not undertake to confer upon the company the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not, by the ordinance, contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand."

<sup>35</sup> *Citizens' Coach Co. v. Camden H. R. R. Co.*, 33 N. J. Eq. 267, affirming *S. C.* 31 N. J. Eq. 525. In *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 28 N. J. Eq. 145, which is the same case, a preliminary injunction was granted, but was set aside in *Citizens' Coach Co. v. Camden H. R. R. Co.*, 29 N. J. Eq. 299, on grounds not affecting the merits of the case.

<sup>36</sup> *Union Passenger Ry. Co. v. Continental Ry. Co.*, 11 Phil. 321; *Fidelity Trust etc. Co. v. Mobile St. R. R. Co.*, 53 Fed. Rep. 687.

in the reports based upon such a right. A competing railroad impairing the franchise of a canal is not a taking,<sup>37</sup> but it has been intimated that a railroad within a few feet of a canal might produce actionable injury, if, by frightening the horses, or otherwise, it materially injured the rights and property of the company.<sup>38</sup>

An exclusive right to furnish gas or water to a city or village, or to use the streets for that purpose, will be protected by injunction.<sup>39</sup> But an exclusive privilege of lighting with gas is not infringed by the grant of a privilege to light with electricity in the same territory.<sup>40</sup> An exclusive franchise "to supply heat to the public from gas within the city of Pittsburgh," was held not to preclude a franchise to supply heat to the same public from natural gas brought from without the city.<sup>41</sup> So an exclusive right to supply a city with water from "Three Mile Creek" is not interfered with by a grant to supply water derived from other sources.<sup>42</sup> Where the exclusive right of furnishing water within a certain borough was granted to a private company, the construction and operation of works by the borough itself was held to be no infringement of the grant.<sup>43</sup>

The forfeiture of a franchise is not a taking of property within the constitution.<sup>44</sup> Under the right reserved to amend the charter of a plank-road company, the legislature cannot require it to remove its gates within a populous city so as to throw open to the free use of the public two and

<sup>37</sup> *Illinois & Michigan Canal Co. v. C. & R. I. R. R. Co.*, 14 Ill. 314; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh 42.

<sup>38</sup> *Hudson & Delaware Canal Co. v. N. Y. & Erie R. R. Co.*, 9 Paige 323.

<sup>39</sup> *Metropolitan Gas Co. v. Hyde Park*, 27 Ill. App. 361; *City of Newport v. Newport Light Co.*, 84 Ky. 166. And see *Citi-*

*zens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1.

<sup>40</sup> *Gas Co. v. Parkersburg*, 30 W. Va. 435.

<sup>41</sup> *Emerson v. Commonwealth*, 108 Pa. St. 111.

<sup>42</sup> *Stein v. Blenville Water Supply Co.*, 34 Fed. Rep. 145.

<sup>43</sup> *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515.

<sup>44</sup> *State Bank v. State*, 1 Blackf. 267.

a half miles of its road.<sup>45</sup> This would be to deprive the company of its property without due process of law.

§ 139a. **Electrical franchises and electrical interference.**—A telegraph or telephone line upon a street may be damaged by the construction and operation of an electric railway on the same street. Such damage may arise, both from induction and conduction. Some courts have held that the grant to a telegraph or telephone company is subject to the use of the street for all legitimate street purposes, that the electric railway is such in purpose, and, therefore, that the telegraph or telephone company has no remedy for damage caused by the railroad company, unless it is due to negligence.<sup>46</sup> In Tennessee it has been held that if the railroad company places its poles and wires so as to interfere with those of the telephone company, the former will be liable for damage occasioned; also that injury to the telephone company by conduction or the escape of electricity through the ground to the telephone wires, both companies using the ground as a return circuit, was such a damage as amounted to a taking of the telephone company's property, for which compensation must be made; but that the injury by induction, being one which inevitably resulted from the exercise of its right by the railroad company, was one which must be borne or obviated by the telephone company.<sup>47</sup> In Missouri, where telegraph and telephone lines are held to be legitimate street uses, a light company was restrained from placing its wires within eight feet of the wires of a telegraph company.<sup>48</sup> An electric

<sup>45</sup> *Detroit v. Detroit & Howell Plank Road Co.*, 43 Mich. 140.

<sup>46</sup> *Cincinnati Inclined Plane R. Co. v. City & Suburban Tel. Assn.*, 48 Ohio St. 390, 27 N. E. Rep. 890, 4 Am. R. R. & Corp. Rep. 533; *Hudson Riv. Tel. Co. v. Watervliet T. & R. R. Co.*, 135 N. Y. 393, 32 N. E. Rep. 148, 6 Am. R. R. & Corp. Rep. 619, reversing 61 Hun 140; *Cumberland Tel. & Tel. Co. v. United*

*Electric R. R. Co.*, 42 Fed. Rep. 272; *National Tel. Co. v. Baker*, L. R. (1893) 2 Ch. D. 186.

<sup>47</sup> *Cumberland Tel. & Tel. Co. v. United Electric R. R. Co.*, 93 Tenn. 492, 29 S. W. Rep. 104, 10 Am. R. R. & Corp. Rep. 549. See also *Central Pa. Tel. & Supply Co. v. Wilkes-Barre etc. R. R. Co.*, 11 Pa. Co. Ct. 417.

<sup>48</sup> *Western Union Tel. Co. v. Electric Light Co.*, 46 Mo. App.

railroad will be prevented by injunction from any unnecessary interference with a telephone company.<sup>49</sup>

§ 140. **Change of use, or an additional use.**—We have already discussed this subject, in some of its aspects, in the chapter upon streets and highways.<sup>50</sup> We have there shown that land taken for a street could not be devoted to any additional use, distinct from its use as a highway, without compensation to the abutting owner for any interference with his rights. It may be laid down as a general proposition that, where an easement only is taken, the land will revert to the owner of the fee when it ceases to be used for the particular purpose for which it was taken.<sup>51</sup> The soil cannot be devoted to a different use, whether more or less onerous, without a new condemnation and compensation paid.<sup>52</sup> When a fee simple estate is taken for public use, it may be either absolute or qualified. If absolute, then no individual has any interest in the land or its use, and it may be devoted to any purpose in the discretion of the legislature, or even sold to private parties.<sup>53</sup> A qualified fee is one which is held in trust, as it were, for some particular public use or uses, the execution of which affects the value or enjoyment of particular property. In such case the owners of the property so affected have a right to the faithful execution of the trust, in the nature of an easement in the property so held in trust, and the legislature cannot divert it to a different use without compensation to the owners of the property affected. Thus lands taken for an asylum, jail or school-house are usually held by a fee simple absolute, while lands acquired for streets and public grounds, though held in fee, are nevertheless

120. See also *Nebraska Tel. Co. v. York Gas etc. Co.*, 27 Neb. 284, 43 N. W. Rep. 126; *Paris Elec. L. & R. R. Co. v. S. W. Tel. & Tel. Co.* (Tex. Civ. App.), 27 S. W. 902; *Western Union Tel. Co. v. Los Angeles Elec. Co.*, 76 Fed. Rep. 178.

<sup>49</sup> *Birmingham Traction Co. v.*

*Southern Bell Tel. & Tel. Co.*, 119 Ala. 144, 24 So. Rep. 731.

<sup>50</sup> Ante, chap. v.

<sup>51</sup> Post, §§ 596, 597.

<sup>52</sup> See cases cited in following notes, also ante, §§ 110-125, 130-133; and *State v. Laverack*, 34 N. J. L. 201.

<sup>53</sup> Post, § 593.

held in trust for the use specified. The nature of this trust, where the land is held for street purposes and the rights or easements of abutting owners therein, have been considered in the last chapter.<sup>54</sup> As a general rule, land dedicated for a public park or square, may not be diverted to other uses, such as a jail,<sup>55</sup> public building,<sup>56</sup> or otherwise,<sup>57</sup> and those having property adjacent to such square or public ground, have a right in the nature of an easement that the trust attached to such public grounds shall be faithfully executed.<sup>58</sup> Land conveyed to a town for a market cannot be used for a court-house,<sup>59</sup> and land dedicated for a court-house cannot be used for other purposes.<sup>60</sup> Railroads may be laid in public parks, for the purpose of facilitating the enjoyment and use of the park.<sup>61</sup> As to

<sup>54</sup> Ante, §§ 91e-91i.

<sup>55</sup> *Flaten v. City of Moorhead*, 51 Minn. 518, 53 N. W. Rep. 807; *Corporation of Sequin v. Ireland*, 57 Tex. 183.

<sup>56</sup> *Rowzee v. Pierce*, 75 Miss. 846; *Princeville v. Auten*, 77 Ill. 325; *Foster v. City of Buffalo*, 64 How. Pr. 127. In Pennsylvania it is held that the great square of a county town may be used for a court house, but when a new court house has been built the old one cannot be retained and rented in part for private purposes and used in part for a treasurer's office. *Commonwealth v. Bowman*, 3 Pa. St. 202.

<sup>57</sup> *Clencq v. Trustees of Gallopols*, 7 Ohio, Pt. 1st, 217; *Gillman v. City of Milwaukee*, 55 Wis. 328; *United States v. Illinois Central R. R. Co.*, 2 Blss. 174; *Sturmer v. County Court*, 42 W. Va. 724. And see *State Historical Assn. v. Lincoln*, 14 Neb. 336; *Douglass v. Montgomery*, 118 Ala. 599, 24 So. Rep. 745.

<sup>58</sup> *Foster v. City of Buffalo*, 64

How. Pr. 127. But see *Anderson v. Rochester etc. R. R. Co.*, 9 How. Pr. 553; *Clark v. City of Providence*, 16 R. I. 337, 15 Atl. Rep. 763; *Mowry v. City of Providence*, 16 R. I. 422, 16 Atl. Rep. 511. In the latter cases the city of Providence was authorized by the legislature to discontinue a public park and sell the lands at pleasure. It was held that owners of land in the vicinity could not enjoin the carrying into effect of the act.

<sup>59</sup> *Attorney General v. Goderich*, 5 Grant (U. C.) 402.

<sup>60</sup> *Lamar County v. Clements*, 49 Tex. 348. Where land was dedicated for a court house and standing room for wagons, etc., it was held that the city could not lay it out into grass plats, walks, etc. *Board of Supervisors v. City of Winchester*, 84 Va. 467, 4 S. E. Rep. 844.

<sup>61</sup> *People v. Park etc. R. R. Co.*, 76 Cal. 156; *Philadelphia v. Commissioners of Fairmount Park*, 16 Pa. Co. Ct. 625; *Philadelphia*

what use may be made of land along a river or water front dedicated to public use, there is considerable doubt under the authorities.<sup>62</sup> A city condemned a strip of land for laying water pipe. It was held that a telephone line thereon, connecting the pumping station with the central fire station and for the exclusive use of the city, was an additional burden.<sup>63</sup>

§ 141. **Change of use: Instances.**—The different kinds of toll-roads are public highways, in the same sense, and to the same extent, as ordinary roads. The only difference is as to the manner of maintaining them.<sup>64</sup> Consequently, when a turnpike is laid out over a common highway,<sup>65</sup> or when a turnpike is made a common highway, to be maintained at the public expense,<sup>66</sup> the owner of the fee is en-

v. McManes, 175 Pa. St. 23, 34 Atl. Rep. 331.

<sup>62</sup> In re Mayor etc. of New York, 135 N. Y. 253, 31 N. E. Rep. 1043; Illinois etc. R. & C. Co. v. St. Louis, 2 Dill. 70; Memphis v. Wright, 6 Yerg. 497; McNeil v. Hicks, 34 La. An. 1090; Portland & Willamette Valley R. Co. v. Portland, 14 Or. 188; Platt v. Chicago etc. R. R. Co., 74 Ia. 127, 37 N. W. Rep. 107; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. Rep. 358; Burlington Gas Light Co. v. Burlington etc. R. R. Co., 165 U. S. 370, 17 S. C. Rep. 359.

<sup>63</sup> Spokane v. Colby, 16 Wash. 610.

<sup>64</sup> State v. Maine, 27 Conn. 641, and cases cited in the following notes.

<sup>65</sup> Chagrin Falls & Cleveland Plank Road Co. v. Cane, 2 Ohio St. 419; Panton Turnpike Co. v. Bishop, 11 Vt. 198; Morgan v. Monmouth Plank Road Co., 26 N. J. L. 99; Wright v. Carter, 27 N. J. L. 76; Nolensville v. Ba-

ker, 4 Humph. 315; Douglass v. Boonsborough Turnpike Co., 22 Md. 219; Benedict v. Golt, 3 Barb. 459; Turner v. Rising Sun etc. Turnpike Co., 71 Ind. 547; Stratton v. Elliott, 83 Ind. 425; Danville etc. Road Co. v. Campbell, 87 Ind. 57; Palmer v. Logansport etc. Gravel R. Co., 108 Ind. 137; Walker v. Caywood, 31 N. Y. 51; but see, as involving a contrary doctrine, Williams v. Natural Bridge Plank Road, 21 Mo. 580, and Cape Girardeau etc. Road Co. v. Renfro, 58 Mo. 265, 274. Where a public road is taken by a turnpike company the erection of a toll-house on the road is an additional burden. Wright v. Carter, 27 N. J. L. 76, and remarks on this case in State v. Laverack, 34 N. J. L. at p. 207. Same point as to toll-house. Stratton v. Elliott, 83 Ind. 425; Danville etc. Road Co. v. Campbell, 87 Ind. 57; Perkins v. Moorestown etc. Turnpike Co., 48 N. J. Eq. 499, 22 Atl. Rep. 180.

<sup>66</sup> Murray v. Commissioners of



titled to no compensation. There has, in fact, been no change of use, nor any additional burden cast upon the land. Where a highway is taken by a turnpike company, the company has the same right to repair and improve it, by changing the grade or otherwise, that the public had, and will not be liable for consequential damages resulting therefrom.<sup>67</sup> Nor in such case is the town entitled to compensation for the expense of making the road in the first instance.<sup>68</sup> It is generally held that a ferry landing upon a highway is an additional burden for which the owner of the fee is entitled to compensation.<sup>69</sup> Nor can a ferry landing be established upon a turnpike without compensation to the owner of the franchise.<sup>70</sup> Land taken for a turnpike cannot be transferred to a railroad company without compensation to the owner of the fee.<sup>71</sup> But a turnpike may be condemned for a railroad when authorized by the legislature, and in such case the owner of the fee is only entitled to compensation for the additional burden upon his soil, if any.<sup>72</sup> It has been held that a street railroad may be laid over a toll-bridge, under such terms as

Berkshire, 12 Met. 455; *Pierce v. Somersworth*, 10 N. H. 369; *Barclay v. Lebanon*, 11 N. H. 19; *State v. Maine*, 27 Conn. 641; *Hingham & Quincy Bridge Co. v. County of Norfolk*, 6 Allen, 353; *Heath v. Barman*, 49 Barb. 496; *Heath v. Barmore*, 50 N. Y. 302; *Pittsburgh etc. R. R. Co. v. Commonwealth*, 104 Pa. St. 583.

<sup>67</sup> *Benedict v. Goit*, 3 Barb. 459; *Douglass v. Boonesborough Turnpike Co.*, 22 Md. 219; but see *Williams v. Natural Bridge Turnpike Co.*, 21 Mo. 580.

<sup>68</sup> *Town of Barnet v. Passumpsic Turnpike Co.*, 15 Vt. 757; see also *Monmouth County v. Red Bank etc. Turnpike Co.*, 18 N. J. Eq. 91; *Waterbury River Turnpike Co. v. Litchfield*, 26 Conn. 209. Upon the repeal of a turn-

pike charter the pike does not become a public highway, which the public are bound to keep in repair. *State v. New Boston*, 11 N. H. 407.

<sup>69</sup> *Prosser v. Wapello*, 18 Ia. 327; *Prosser v. Davis*, 18 Ia. 367; *Pipkin v. Wynns*, 2 Dev. (N. C.) 402; *Chambers v. Farry*, 1 Yeates 167; *Chess v. Manown*, 3 Watts 219.

<sup>70</sup> *Lexington etc. Turnpike Co. v. McMurtry*, 3 B. Mon. 516. Contra: *Clarke v. White*, 5 Bush, 353.

<sup>71</sup> *Mahon v. New York Central R. R. Co.*, 24 N. Y. 658; *Ellicottville etc. Plank Road Co. v. Buffalo etc. R. R. Co.*, 20 Barb. 644.

<sup>72</sup> *Brainard v. Missisquoi R. R. Co.*, 48 Vt. 107; *Mifflin v. Railroad Company*, 16 Pa. St. 182.

will protect the rights of the bridge company and the traveling public, without compensation to the bridge company.<sup>73</sup> A railroad on a canal bank is an additional use.<sup>74</sup> Where a railroad company is authorized to condemn a canal, it has been held that the land does not revert to the owner of the fee, but the public easement is transferred to the railroad company, and the owner of the fee is only entitled to such damages as are occasioned by the new use.<sup>75</sup> But, if the public easement is voluntarily abandoned, the soil reverts to the owner of the fee. This right of reversion is property, of which the owner cannot be deprived without compensation. Accordingly, where a railroad company has an easement only, and transfers its right of way to a municipal corporation for a street, pursuant to an authority given by the legislature, and takes up and removes its track, the land reverts to the owner of the fee, and he can maintain ejectment therefor.<sup>76</sup> So where an easement is taken for a canal which is abandoned and the right of way transferred to a railroad company.<sup>77</sup> Land which is subject to a ferry landing may be used for a bridge without further compensation.<sup>78</sup> Property abutting on an alley cannot be said to be damaged by taking the alley for a street, as the street affords the same privileges as the alley.<sup>79</sup> A third-class road, on which the owner of the fee

<sup>73</sup> *Pittsburgh etc. Pass. R. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37, 30 Atl. Rep. 511. And see *County of Floyd v. Rowe Street R. R. Co.*, 77 Ga. 614. Contra: *New York etc. R. R. Co. v. Fair Haven etc. R. R. Co.*, 70 Conn. 610.

<sup>74</sup> *La Fayette, Muncie & B. R. R. Co. v. Murdock*, 68 Ind. 137; *Vought v. Columbus etc. R. R. Co.*, 58 Ohio St. 123.

<sup>75</sup> *Hatch v. Cincinnati & Indiana R. R. Co.*, 18 Ohio St. 92; *Chase v. Sutton Manufacturing Co.*, 4 Cush. 152. But see note 77.

<sup>76</sup> *Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Same*, 68 N. Y. 1.

Compare cases cited in last note.

<sup>77</sup> *Pittsburgh & Lake Erie R. R. Co. v. Bruce*, 102 Pa. St. 23. In *Taylor v. Chicago etc. R. R. Co.*, 83 Wis. 636, 53 N. W. Rep. 853, it is said that even if a canal company has a fee in its right of way, it cannot transfer the same to a railroad company, so as to authorize its use for railroad purposes, without compensation to those to whom the land would revert. And see *Whitney v. State of New York*, 96 N. Y. 249.

<sup>78</sup> *Hudson v. Cuero Land & Emigration Co.*, 47 Tex. 56.

<sup>79</sup> *Fagan v. Chicago*, 84 Ill. 227.

is allowed to maintain gates, cannot be changed to a second-class road, on which gates are not allowed without further compensation.<sup>80</sup> Nor can a private road be made a public way without consent or compensation.<sup>81</sup> Where an irrigation canal is enlarged and causes new damage an action will lie.<sup>81a</sup>

§ 141a. **New burdens on railroad right of way.**—A line of telegraph on a railroad right of way is an additional burden, for which compensation must be made to the owner of the fee,<sup>82</sup> unless the line is constructed for the use of the railroad company in the operation of its road and dispatch of its business.<sup>83</sup> A railroad company may, from time to time, construct as many tracks and sidetracks on its right of way as it deems necessary for the transaction of its business.<sup>84</sup> But where a right of way is acquired for main line only, sidetracks cannot be laid thereon without additional compensation.<sup>85</sup> Nor can a railroad company grant a part of its right of way to the use of another company, as against the owner of the fee.<sup>86</sup> But it has been held that one railroad company may grant the joint use of its tracks to another company, without imposing any additional burden on

<sup>80</sup> *Bounds v. Kirven*, 63 Tex. 159; *Woodbridge v. Eastland Co.*, 70 Tex. 680, 8 S. W. Rep. 503; *Parker County v. Jackson*, 5 Tex. Civ. App. 36, 23 S. W. Rep. 924.

<sup>81</sup> *Indianapolis v. Kingsbury*, 101 Ind. 200.

<sup>81a</sup> *Clear Creek Land & Ditch Co. v. Kilkenny*, 5 Wyo. 38.

<sup>82</sup> *American Tel. & Tel. Co. v. Smith*, 71 Md. 535, 18 Atl. Rep. 910, 1 Am. R. R. & Corp. Rep. 73. And see *Atlantic & P. Tel. Co. v. Chicago etc. R. R. Co.*, 6 Biss. 158; *Mercantile Trust Co. v. Atlantic & P. R. R. Co.*, 63 Fed. Rep. 513.

<sup>83</sup> *Western Union Tel. Co. v. Fich*, 19 Kan. 517. In this case it was held that a telegraph was

indispensable for the safe and proper operation of a railroad, and that it made no difference that the telegraph was being constructed by a distinct company and for the joint use of the two corporations.

<sup>84</sup> *East Tenn. V. & G. R. R. Co. v. Telford's Exrs.*, 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364; *Borough of Pottsville v. People's R. R. Co.*, 148 Pa. St. 175, 23 Atl. Rep. 900; *White v. Chicago etc. R. R. Co.*, 122 Ind. 317, 23 N. E. Rep. 782, 2 Am. R. R. & Corp. Rep. 138.

<sup>85</sup> *Donnithorpe v. Fremont etc. R. R. Co.*, 30 Neb. 142, 46 N. W. Rep. 240, 3 Am. R. R. & Corp. Rep. 172.

<sup>86</sup> *Ft. Worth etc. R. R. Co. v.*

the land or entitling the owner to compensation.<sup>87</sup> Where a right of way was condemned through a tract of land abutting on a river, and the railroad company was afterwards authorized to build a bridge, with approaches, both for railroad and highway traffic, it was held that the latter use was an additional burden on the soil, entitling the owner to compensation.<sup>88</sup> The rights of the railroad company in its right of way, generally, are treated in another connection.<sup>89</sup>

§ 141b. Joint use of tracks.—It has never been intimated that one commercial railroad could acquire the right to use the tracks of another such railroad, except by agreement or an exercise of the eminent domain power. And no such right can be condemned without express legislative authority.<sup>90</sup> But it has been claimed that the legislature may provide for the joint use of street car tracks under the police power.<sup>91</sup> This is undoubtedly a mistaken view. For any damage or inconvenience resulting from a legitimate exercise of the police power, no compensation can be had.<sup>92</sup> The tracks and franchises of a street railroad company are private property, and are protected by the constitution, the same as any other property.<sup>93</sup> It necessarily follows

Jennings, 76 Tex. 373, 13 S. W. Rep. 270, 2 Am. R. R. & Corp. Rep. 121; *Blakely v. Chicago etc. R. R. Co.*, 34 Neb. 284, 51 N. W. Rep. 767, 6 Am. R. R. & Corp. Rep. 262; *Platt v. Pennsylvania R. R. Co.*, 43 Ohio St., 228; *Pennsylvania Co. v. Platt*, 47 Ohio St., 336, 25 N. E. Rep. 1028.

<sup>87</sup> *Miller v. Green Bay etc. R. R. Co.*, 59 Minn. 169, 60 N. W. Rep. 1006, 11 Am. R. R. & Corp. Rep. 246.

<sup>88</sup> *Payne v. Kansas etc. R. R. Co.*, 46 Fed. Rep. 546; *Kansas etc. R. R. Co. v. Payne*, 49 Fed. Rep. 114, 1 C. C. A. 183; *Kansas etc. R. R. Co. v. Le Flora*, 49 Fed. Rep. 119, 1 C. C. A. 192.

<sup>89</sup> Post, §§ 584-588.

<sup>90</sup> *Minneapolis & St. Louis R. Co. v. Minneapolis & W. R. Co.*, 61 Minn. 502, 63 N. W. Rep. 1035.

<sup>91</sup> *Booth Street Ry. Law*, §§ 110, 115; *Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co.* (Ky.), 19 Am. L. Reg. (N. S.) 765; *Canal & C. St. R. R. Co. v. Crescent City R. R. Co.*, 41 La. An. 561, 6 So. Rep. 849; *Pacific R. R. Co. v. Wade*, 91 Cal. 449, 27 Pac. Rep. 768; *Union Depot R. R. Co. v. Southern R. R. Co.*, 105 Mo. 562, 16 S. W. Rep. 920, 4 Am. R. R. & Corp. Rep. 622.

<sup>92</sup> Post § 156.

<sup>93</sup> *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358; *Kinsman St.*

that to authorize one company to use the tracks of another, is to take the property of the latter, and this cannot be done without compensation.<sup>94</sup> In many cases the right is reserved when the original grant is made, to permit other

R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239; Toledo Consolidated St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. Rep. 312, S. C., 6 Ohio C. C. 362; Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550, S. C., 20 N. J. Eq. 61; Camden Horse R. R. Co. v. Citizens' Coach Co., 28 N. J. Eq. 145, S. C., 29 N. J. Eq. 299, 31 N. J. Eq. 525, 33 N. J. Eq. 267; Union Pass. R. R. Co. v. Continental R. R. Co., 11 Phila. 321; Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. Law Reg. (N. S.) 265, S. C., 1 Ky. Law Rep. 341; Citizens' Horse R. R. Co. v. City of Belleville, 47 Ill. App. 388; City of Belleville v. Citizens' Horse R. R. Co., 152 Ill. 171, 33 N. E. Rep. 584; People v. O'Brien, 111 N. Y. 1; Canal & C. R. Co. v. Orleans R. R. Co., 44 La. An. 54, 10 South. Rep. 389; Chicago General R. R. Co. v. Chicago City R. R. Co., 10 Nat. Corp. Rep. 651; City of Houston v. Houston City St. R. R. Co., 83 Tex. 548, 19 S. W. Rep. 127, 6 Am. R. R. & Corp. Rep. 106; Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. Rep. 676. Compare Lake Road El. R. R. Co. v. City of Baltimore, 77 Md. 352, 26 Atl. Rep. 510, 7 Am. R. R. & Corp. Rep. 619; Pacific R. R. Co. v. Wade, 91 Cal. 449, 27 Pac. Rep. 763.

<sup>94</sup> Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. L. Reg. (N. S.) 765; Louisville City R. R. Co. v. Central Pass. R. R. Co., 87 Ky. 223, 8 S. W. Rep. 329; Canal & C. St. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 So. Rep. 849; Canal & C. R. R. Co. v. Orleans R. R. Co., 44 La. An. 51, 10 South. Rep. 389; Canal & C. R. R. Co. v. St. Charles St. R. R. Co., 44 La. An. 1069, 11 South. Rep. 702; Canal & C. R. R. Co. v. Crescent City R. R. Co., 44 La. An. 485, 10 South. Rep. 888; New Orleans & C. R. R. Co. v. Canal & C. R. R. Co., 47 La. An. 1476, 17 So. Rep. 834, 12 Am. R. R. & Corp. Rep. 590; Pennsylvania R. R. Co. v. Baltimore & O. R. R. Co., 63 Md. 263; North Baltimore Pass. R. R. Co. v. North Ave. R. R. Co., 75 Md. 233, 23 Atl. Rep. 466; Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550, S. C., 20 N. J. Eq. 61; Sixth Ave. R. R. Co. v. Kerr, 72 N. Y. 330; Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 138; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239; Toledo Consol. St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. Rep. 312, S. C., 6 Ohio C. C. 362; Union Pass. R. R. Co. v. Continental R. R. Co., 11 Phila. 321, 2 Dill. Mun.

companies to use the tracks, on specified terms and conditions.<sup>95</sup>

§ 142. *Interfering with an easement.*—We have already seen that to interfere with or destroy any right appurtenant to property is a taking within the constitution.<sup>1</sup> We have heretofore treated only of those natural rights appurtenant to land which may be interfered with by works upon adjacent land. But one may have annexed to his land easements in the land of others, derived by grant or prescription. Such easements cannot be destroyed or impaired by public works without compensation.<sup>2</sup> This principle is well illustrated by the case of *Arnold v. Hudson River R. R. Co.*<sup>3</sup> Arnold was the owner of a factory, with the right to take water from a pond at some distance from his factory and convey it thereto, over the land of another, in a race way or trunk, either over or under the ground. For this purpose Arnold had built and had in use a trunk some six feet above the ground. The defendant, having acquired title to a portion of the intervening lands, took down the trunk, laid it beneath the ground and its tracks, and then raised the water by means of a penstock into the old trunk. Arnold permitted this to be done on the assurance of the company's agent that it would make the water-course as good as formerly, and also keep the same in repair. The water-power was impaired, and the expense

Corp. § 727; *Crescent City R. R. Co. v. New Orleans etc. R. R. Co.*, 48 La. An. 856, 19 So. Rep. 868.

<sup>95</sup> *Grand Ave. R. R. Co. v. Lindell R. R. Co.*, 148 Mo. 637; *Grand Ave. R. R. Co. v. Citizens' R. R. Co.*, 148 Mo. 665. The subject of the joint use of tracks will be found treated in its various phases in note to *Grand Ave. R. R. Co. v. People's R. R. Co.*, 12 Am. R. R. & Corp. Rep. 594, 603.

<sup>1</sup> Ante, § 56.

<sup>2</sup> *Indianapolis & Cumberland Gravel Road Co. v. Belt Ry. Co.*, 110 Ind. 5; *Willey v. Norfolk Southern Ry. Co.*, 96 N. C. 408; *Spencer v. New York, etc. R. R. Co.*, 62 Conn. 242, 25 Atl. Rep. 350; *Alexandria etc. R. R. Co. v. Faunce*, 31 Gratt, 761; *Strickler v. Colorado Springs*, 16 Col. 61, 26 Pac. Rep. 313. See *Kingsland v. New York*, 110 N. Y. 569, 13 N. E. Rep. 435.

<sup>3</sup> 55 N. Y. 661. See also, for comments on same case, *Story v.*

of repairs was increased. It was held that the easement was property within the constitution, and that the plaintiff was entitled to compensation. The principle of this case will apply to all easements.<sup>4</sup> One who has a mere parol license to hunt and fish over lands has no such interest as entitles him to compensation for interference by a railroad company.<sup>5</sup> Where the owners of lots covenant that certain portions of the lots shall not be built upon or occupied with buildings above a certain height, each acquires an easement of light, air and prospect in the lots of the other covenantors, and when some are taken for a court-house free of any easements, the owners of the others are entitled to compensation.<sup>6</sup>

§ 143. **Possessory rights in public lands.**—One having the mere naked possession of public lands is not entitled to compensation when the same are taken for public use.<sup>7</sup> The fact that such a person has a right to preëmpt, or intends to do so, is immaterial, unless he has actually taken steps, by entry and payment, to secure his right.<sup>8</sup> If the right of way through public lands is granted to a railroad company, one subsequently acquiring title thereto takes subject to such right of way.<sup>9</sup> But it has been held that one having growing crops upon public lands is entitled to compensation for injury thereto.<sup>10</sup>

§ 144. **Mapping Territory into streets and blocks for future improvements.**—It has been a common practice in the older cities for the legislature to authorize the public

N. Y. Elevated R. R. Co., 90 N. Y., p. 149.

<sup>4</sup> See, in this connection, *Boston Gas Light Co. v. Old Colony & Newport Ry. Co.*, 14 Allen, 444.

<sup>5</sup> *Bird v. Great Eastern Ry. Co.*, 24 L. J. C. P. 366.

<sup>6</sup> *Ladd v. Boston*, 151 Mass. 585, 24 N. E. Rep. 858.

<sup>7</sup> *Allard v. Loban*, 3 Martin, 1 A. N. S. 293; *Doran v. Central Pacific R. R. Co.*, 24 Cal. 245; *Holtart v. Ford*, 6 Nev. 77; *Rosa v.*

*Missouri, Kansas & Texas Ry. Co.*, 18 Kan. 124; contra: *Cal. Northern R. R. Co. v. Gould*, 21 Cal. 254.

<sup>8</sup> *Western Pacific R. R. Co. v. Kerr*, 41 Cal. 489; *Hamilton v. Spokane etc. R. R. Co.*, 2 Idaho 898, 28 Pac. Rep. 408.

<sup>9</sup> *Davis v. East Tenn. & Ga. R. Co.*, 1 Sneed, 94.

<sup>10</sup> *Gillan v. Hutchinson*, 16 Cal. 153; *Rosa v. Missouri, Kansas & Texas Ry. Co.*, 18 Kan. 124.

authorities to make a map of vacant lands, indicating the location of streets, alleys and public grounds for future improvement, and to provide that when the streets are opened they shall be opened as designated on the map, and that no improvements shall be placed upon the parts designated as streets or public grounds. It is evident that, if such an act is valid, the owner would be deprived or at least greatly restricted in the enjoyment of one of the most valuable rights of property, without any compensation, viz: the right of user. Consequently, so much of such an act as restricts the right to make improvements is void, and when such streets are opened the owners of property taken are entitled to compensation precisely the same as though the streets had not been previously designated.<sup>11</sup> The mere making of such a map or plat does not affect any right of property, and is not a taking.<sup>12</sup> Nor does the filing

<sup>11</sup> *Moale v. Baltimore*, 5 Md. 314; *Stewart v. Baltimore*, 7 Md. 500; *Baltimore v. Hook*, 62 Md. 371; *State v. Carragan*, 36 N. J. L. 52; *Warren v. Bunnell*, 11 Vt. 600; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. Rep. 976, affirming S. C. 60 N. Y. Supr. 313; *Baltimore v. St. Agnes' Hospital*, 48 Md. 419; *Terrill v. Town of Bloomfield (Ky.)*, 21 S. W. Rep. 1041; *In re 44th St.*, 7 Pa. Co. Ct., 69; *Paine Lumber Co. v. City of Oshkosh*, 86 Wis. 397, 56 N. W. Rep. 1088; and see *Beldler's Appeal*, 1 Monaghan (Pa. Supm. Ct.) 336; *German-American Real Est. Co. v. Meyers*, 32 App. Div. N. Y. 41.

Such an act was held valid in New York on the ground that it was passed before there was any limitation in the constitution of that State upon the power of eminent domain, and compensation for improvements placed within the lines of a proposed street

was denied, although the street was not actually laid out until seventeen years after the map was made. *Matter of Furman Street*, 17 Wend. 649. This case was followed in Pennsylvania without noticing the ground on which it rested. *Forbes Street*, 70 Pa. St. 125; see also *District of City of Pittsburgh*, 2 W. & S. 320; *In re Sedgeley Avenue*, 88 Pa. St. 509; *Matter of Snyder Avenue*, 14 Phil. 346; see *Matter of 127th Street*, 56 How. Pr. 60.

<sup>12</sup> *Clark v. City of Elizabeth*, 37 N. J. L. 120; *District of City of Pittsburgh*, 2 W. & S. 320; *State v. Seymour*, 35 N. J. L. 47; *District of Columbia v. Armes*, 8 App. Cas. D. C. 393; *Burch v. City of McKeesport*, 166 Pa. St. 57, 30 Atl. Rep. 1023; *New York Central etc. R. R. Co. v. Haffen*, 90 Hun 260, 35 N. Y. Supp. 806; but see *State v. Hudson County Ave. Coms.*, 37 N. J. L. 12.



of such a map under such a statute constitute any incumbrance upon the land designated as a street, and a vendee cannot successfully object to the title on that ground.<sup>13</sup> If the owner conveys with reference to such map or plat, he thereby adopts the same and dedicates for public use so much of his land as is thereon designated for streets and public places,<sup>14</sup> and when they are afterwards opened for use is entitled only to nominal damages.<sup>15</sup> The failure of a city to open streets which have been projected does not render it liable to one who has built on the supposition that that would be done.<sup>16</sup>

§ 144a. **Establishing building lines.**—The attempt by statute or ordinance to establish building lines on a street, whereby the abutting owners are prohibited from placing any building within a specified distance of the street line, is similar to the practice noticed in the last section. Such a law deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the

<sup>13</sup> *Forster v. Scott*, 136 N. Y. 577, 32 N. E. Rep. 976, affirming S. C. 60, N. Y. Supr. Ct. 313. In the opinion of the Court of Appeals it is said: "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that may be desirable or valuable in the title or possession. It is not necessary, in order to render a statute obnoxious, to the restraints of the constitution, that it must, in

terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. \* \* \* As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value, and interfered with his power of disposition, it was to that extent void as to him, and created no incumbrance upon it."

<sup>14</sup> *Clark v. City of Elizabeth*, 37 N. J. L. 120; *Matter of Furman Street*, 17 Wend. 649.

<sup>15</sup> See cases in last note and post, § 500; and see *Morris Canal Co. v. Jersey City*, 12 N. J. Eq. 252; Same on appeal, 547.

<sup>16</sup> *Collins v. Savannah*, 77 Ga.

constitution, and, consequently, can only be carried out by making provision for the compensation of the owner.<sup>17</sup> In commenting upon such an ordinance, the supreme court of Missouri, in the case cited, says: "The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty feet strip, except under the peril of punishment, as if the city had built a wall around it, and this, too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

§ 145. **Justifiable entries.**—One of the constituent rights of property in land is the right of exclusion, that is, the right to exclude others from its possession and enjoyment. This right, however, is not absolute, but is subject to certain overruling necessities. Thus an entry upon land will be justified, not only without consent of the owner, but even against his positive prohibition, if necessary to escape bodily harm or secure property which is found there without the privity or fault of its owner. If a highway is impassable, one may go round the obstruction on private property.<sup>18</sup> All such entries, however, are limited by the necessities of the case and must be made with the least possible injury, and continued for only a reasonable time.<sup>19</sup> A somewhat similar necessity justifies an entry on private property for the purpose of making preliminary surveys. Unless this was allowable it would be almost impossible to construct a public work, such as a railway or canal. It has accordingly been held that an entry for preliminary surveys is not a taking, but may be justified on the ground

745. See also *Funke v. City of St. Louis*, 122 Mo. 132, 26 S. W. Rep. 1034.

<sup>17</sup> *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. Rep. 861, 8 Am. R. R. & Corp. Rep. 422.

<sup>18</sup> *Morey v. Fitzgerald*, 56 Vt.

487; *Campbell v. Race*, 7 Cush. 408; 2 Bl. Com. 37; *Ball v. Herbert*, 3 T. R. 253; *Ruch v. New Orleans*, 43 La. An. 275, 9 So. Rep. 473.

<sup>19</sup> *Orr v. Quimby*, 54 N. H. 590.

of necessity.<sup>20</sup> If possession be continued an unreasonable time, or any unnecessary damage is done, the persons making or authorizing the entry become trespassers *ab initio*.<sup>21</sup> The possession gained by such entry cannot be continued for the purpose of construction,<sup>22</sup> or the prosecution of experimental works.<sup>23</sup> And so, on the same ground, and subject to the same limitations, an entry upon private property is justifiable for the purpose of measuring public boundaries,<sup>24</sup> or making coast surveys by the general government.<sup>25</sup> It has been held in Pennsylvania that the temporary occupation of private property adjacent to a railroad by shanties, stables, shops, etc., during the construction of the road, was justifiable without compensation.<sup>26</sup> In the opinion of the court, the question is treated as one of statutory construction merely. It seems to us that such an intrusion is prohibited by the constitution.<sup>27</sup>

§ 146. *Injuries by blasting.*—It is a common practice in the construction of a railroad or other public work to resort to blasting, in consequence of which fragments of rock are frequently projected beyond the limits of the company's land. Casting rock upon a man's land is a violation of his right of exclusion. All the authorities agree that there must be compensation for such damages. But some cases hold that such compensation is included in the original award, and that a separate action therefore will not lie.<sup>28</sup> Other cases hold the contrary doctrine, which

<sup>20</sup> *Cushman v. Smith*, 34 Me. 247; *Orr v. Quimby*, 54 N. H. 590, 596; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 449; *Bonaparte v. Camden & Amboy R. R. Co.*, Bald. 205, 225; *Stuart v. Baltimore*, 7 Md. 500, 516; *State v. Seymour*, 35 N. J. L. 47, 53; *Walther v. Warner*, 25 Mo. 277.

<sup>21</sup> See last note; also *Bellingham Bay R. & N. Co. v. Loose*, 2 Wash. 500, 27 Pac. Rep. 174.

<sup>22</sup> *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; *California & Pacific R. R. Co. v. Central Pacific*

*R. R. Co.*, 47 Cal. 528; *Cushman v. Smith*, 34 Me. 247.

<sup>23</sup> *Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq. 334, 338.

<sup>24</sup> *Winslow v. Gifford*, 6 Cush. 327.

<sup>25</sup> *Orr v. Quimby*, 54 N. H. 590, 596.

<sup>26</sup> *Landerbrun v. Duffy*, 2 Pa. St. 398.

<sup>27</sup> *St. Peter v. Denison*, 58 N. Y. 416.

<sup>28</sup> *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363; *Dodge v.*

seems to us the better rule.<sup>29</sup> One from whom no land has been taken, and who consequently has received no award of compensation, would be entitled to recover for such damages within the principle of either class of cases.<sup>30</sup> Debris thus cast upon adjoining land must be removed in a reasonable time, even though there is no liability for the original intrusion.<sup>31</sup> In a recent New York case, brought for injuries to the plaintiff's house caused by jarring and concussion, resulting from blasting on the right of way of

County Commissioners of Essex, 3 Met. 389; *Brown v. Providence, Warren & Bristol R. R. Co.*, 5 Gray, 35; *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208; see also *Tibbetts v. Knox & Lincoln R. R. Co.*, 62 Me. 437; *Eaton v. E. & N. A. Ry. Co.*, 59 Me. 520. In *Blackwell v. Lynchburg & D. R. R. Co.*, 111 N. C. 151, 16 S. E. Rep. 12, which was a suit for injury to plaintiff by a rock projected 200 yards from the place of the blast, the court says: "Excavating by blasting is one of the approved methods of constructing a railway, and the prudent use of such an agency in removing hard material is always deemed to have been in contemplation when the damage was assessed for the right of way, as a necessary incident to the privilege. But when damage is done to the land of the owner, adjacent to that within the condemned boundary, if it result from managing or handling explosive material carelessly or unskillfully, or from the unnecessary use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is an-

swerable in a new action. \* \* \* We do not think that the privilege of throwing stones through the air 200 or more yards, and beyond the right of way, so as to endanger the lives of the owners of adjacent land and of the members of their families, when engaged in their domestic duties in and around their dwelling house, passes with the right of way, as a necessary incident to the easement." The same observations would apply in case of injury to property.

<sup>29</sup> *Hay v. Cohoes Co.*, 2 N. Y. 159; *S. C.* 3 Barb. 42; *Tremain v. Same*, 2 N. Y. 163; *St. Peter v. Denison*, 58 N. Y. 416; *Carman v. Indiana R. R. Co.*, 4 Ohio St. 399. As to the liability of the company for such damages where the work is done by a contractor, compare last case holding that it is, and last two cases of last note holding that it is not.

<sup>30</sup> *Dodge v. County Commissioners of Essex*, 3 Met. 389; *Carman v. Indiana R. R. Co.*, 4 Ohio St. 399.

<sup>31</sup> *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363; *St. Peter v. Denison*, 58 N. Y. 416.

defendant, through and near the plaintiff's lot, the court of appeals adjudicated the following propositions: 1. The powers granted to said road corporations are construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual. 2. The test of the permissible use of one's own land is not whether the use causes damage to his neighbor, but the inquiry is, was the use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy. 3. A railroad company which, having to do blasting on its own land in order to lay its tracks, exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, is not liable for injury to adjoining property arising merely from the incidental jarring. 4. If the damage in such case results from the failure of the railroad company to use due care, it will be liable.<sup>32</sup> The question as to whether injuries

<sup>32</sup> *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 35 N. E. Rep. 592, 9 Am. R. R. & Corp. Rep. 92. According to this authority the question resolves itself into an inquiry as to what is a reasonable use of one's own land. Undoubtedly every owner of land may make a reasonable use of his land. So every owner of land has a right not to be injured in its use or enjoyment by an unreasonable use of adjoining land. These mutual rights and obligations are elaborately discussed in *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545, and *Eaton v. Railroad Co.*, 51 N. H. 504. What is a reasonable or unreasonable use of one's land is largely a

question of fact. Any use may be declared reasonable when, though it may in some cases injuriously affect adjoining property, the right to make such use would tend to the "highest enjoyment of land by the entire community of proprietors." See *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545. This is not materially different from the test laid down in the New York case. Now it may be seriously doubted whether the right to use explosives in excavating upon one's land in such manner as to shake down or greatly impair buildings on adjoining property, is one which, on the whole, will conduce to the highest enjoyment of land by the

from blasting should be included in the estimate of damages will be considered hereafter.<sup>33</sup>

§ 147. **Injury to business.**—All damages which result from the proper construction, use and operation of public works, where no right of property is taken or interfered with, are not a taking and are not actionable.<sup>34</sup> So, too, are all such loss and inconvenience as result from temporarily obstructing the use of public highways by land or water in consequence of the construction of improvements therein by the public authorities.<sup>35</sup> This results from the fact that the use of such highways in connection with private property is subordinate to the right of the public to make such improvements. For damage to business carried on in whole or in part upon property taken, the reader is referred to the chapter on damages.<sup>36</sup>

§ 148. **Highways laid out adjacent to but not taking one's land.**—Where a highway is laid out alongside of a person's land, but without taking any of it, it is held that he is not entitled to compensation, although the duty of maintaining the whole fence on his front is cast upon him, when before that he was only obliged to maintain half.<sup>37</sup> All the authorities are one way upon this question, but their correctness is questionable. Where by law the burden of maintaining a division fence is cast equally upon adjoining proprietors, there are mutual rights and obligations attached to the respective estates. Each has a right to compel the other to contribute his proportion. This right is appurtenant to the estate, for it passes with it. Likewise the obligation. When the adjoining estate is

entire community. In other words, it would seem more to the advantage of the whole community that one who desired to excavate rock on his land should be required to do so in such manner as not to materially injure adjoining property.

<sup>33</sup> Post, § 573; and see *Matter of Thompson*, 43 Hun, 416.

<sup>34</sup> *Hooker v. New Haven &*

*Northampton Co.*, 15 Conn. 312, 319.

<sup>35</sup> *Northern Transportation Co. v. Chicago*, 99 U. S. 635; *S. C. 7 Biss. 45*; *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Plant v. Long Island R. R. Co.*, 10 Barb. 26.

<sup>36</sup> Post, § 487.

<sup>37</sup> *Hoag v. Switzer*, 61 Ill. 294; *People v. Supervisors of Oneida*

taken for a highway, this right is taken with it, and compensation to the extent of the loss should be made. A city bought a lot adjacent to plaintiff's and laid it out as a street. The plaintiff sued for damages on account of being deprived of privacy and rendered liable for assessments for the improvement of the new street. It was held that plaintiff's property was neither taken nor damaged, within the meaning of the constitution.<sup>38</sup>

§ 149. *Interfering with the right of exclusion.*—Any invasion of property, except in case of necessity as heretofore explained, either upon, above or below the surface, and whether temporary or permanent, is a taking: as by constructing a ditch through it,<sup>39</sup> passing under it by a tunnel,<sup>40</sup> laying gas, water or sewer pipes in the soil,<sup>41</sup> or extending structures over it, as a bridge or telephone wire.<sup>42</sup> Even a temporary occupation, as for an annual training,<sup>43</sup> or a road during sleighing time,<sup>44</sup> can only be made pursuant to law, for a public use and upon compensation made.<sup>45</sup> Nor can public authorities interfere with the control or use of a private way, except upon making compen-

County, 19 Wend. 102; Kennett's Petition, 24 N. H. 139.

<sup>38</sup> Peel v. City of Atlanta, 85 Ga. 138, 11 S. E. Rep. 582, 2 Am. R. R. & Corp. Rep. 413. See also Funke v. City of St. Louis, 122 Mo. 132, 26 S. W. Rep. 1034. And see Wells v. Harris, 137 Mo. 512.

<sup>39</sup> Reeves v. Treasurer of Wood County, 8 Ohio St. 333; Watson v. Trustee, 21 Ohio St. 667; People v. Haines, 49 N. Y. 587; Plummer v. Sturtevant, 32 Me. 325. A statute in force since before the Revolution, permitting the surveyors of highways to enter upon land adjoining the way, for the purpose of constructing drains, but providing for no compensation, was held void in Ward v. Peck, 49 N. J. L. 42.

<sup>40</sup> Sparrow v. Oxford, Worcester & Wolverhampton Ry. Co., 2 DeG. McN. & G. 94; Farmer v. Waterloo & City R. R. Co., L. R. (1895) 1 Ch. D. 527.

<sup>41</sup> Smith v. Atlanta, 92 Ga. 119, 17 S. E. Rep. 981; Noon v. Scranton City, 7 Pa. Co. Ct. 123.

<sup>42</sup> Metropolitan W. S. El. R. R. Co. v. Springer, 171 Ill. 170; Bass v. Met. W. S. El. R. R. Co., 82 Fed. Rep. 857 (C. C. A.). And see Western Union Tel. Co. v. Moyle, 51 Kan. 185, 32 Pac. Rep. 895.

<sup>43</sup> Brigham v. Edmonds, 7 Gray, 359.

<sup>44</sup> Holcomb v. Moore, 4 Allen, 529; Holden v. Cole, 1 Pa. St. 303.

<sup>45</sup> See Mackham v. Brown, 37 Ga. 277.

sation.<sup>46</sup> An encroachment upon abutting property in filling a street or building a railroad amounts to a taking.<sup>47</sup> And where a city built a wall along a school lot, which was pressed out by the filling so as to overhang the adjoining lot, it was held an actionable nuisance.<sup>48</sup> Where coal underlying the surface, is owned separately from the surface, it will be protected from intrusion the same as other property.<sup>49</sup> The legislature cannot authorize the use of private property for a ferry landing without compensation.<sup>50</sup>

§ 150. Easement of levee in Louisiana.—Riparian property upon the Mississippi, in the State of Louisiana, is subject to the easement of levee, that is, the right of the State to use so much as may be necessary for the construction of proper levees and to repair or re-locate the same from time to time as the public exigencies may require.<sup>51</sup> And this is true though the title to the property is derived from the United States and belongs to a citizen of another state.<sup>52</sup> This servitude was attached to the land at the time of its original grant.<sup>53</sup> But the land only is so subject, and if buildings are destroyed in constructing a levee, the owner is entitled to compensation.<sup>54</sup> Nor does the servitude extend to the case where the necessity for the levee is created by some collateral or distinct improvement, such as the closing of a bayou.<sup>55</sup> This servitude is peculiar to the law

<sup>46</sup> *Morse v. Stocker*, 1 Allen, 150.

<sup>47</sup> Ante § 102; *Wichita & W. R. R. Co. v. Fechheimer*, 49 Kan. 643, 31 Pac. Rep. 127.

<sup>48</sup> *Miles v. City of Worcester*, 154 Mass. 511, 28 N. E. Rep. 676.

<sup>49</sup> *Penn Gas Coal Co. v. Versailles Fuel Gas Co.*, 131 Pa. St. 522, 19 Atl. Rep. 933; *Robbins v. Guffy*, 20 Phil. 400.

<sup>50</sup> *Blake v. McCarthy*, 56 Miss. 654.

<sup>51</sup> *Mithoff v. Town of Carrollton*, 12 La. An. 185; *Bass v. State*, 34 La. An. 494; *Ruch v.*

*City of New Orleans*, 43 La. An. 275, 9 So. Rep. 473; *Peart v. Meeker*, 45 La. An. 421, 12 So. Rep. 490; *Hart v. Board of Levee Comrs.*, 54 Fed. Rep. 559.

<sup>52</sup> *Eldridge v. Trezevant*, 160 U. S. 452, 16 S. C. Rep. 345.

<sup>53</sup> *Mithoff v. Town of Carrollton*, 12 La. An. 185.

<sup>54</sup> *Cash v. Whitworth*, 13 La. An. 401; *Mithoff v. Carrollton*, 12 La. An. 185; contra: *Dubose v. Levee Commissioners*, 11 La. An. 165; *Hanson v. La Fayette*, 18 La. 295.

<sup>55</sup> *Cash v. Whitworth*, 13 La.



of Louisiana.<sup>56</sup> Where a city instituted proceedings to condemn property for use for levee purposes which proceeded to judgment, it was held that it could not recede from the judgment and construct the levee without compensation by virtue of the servitude.<sup>57</sup>

§ 151. **Interfering with the right of support.**—Every owner of land has a right to the lateral support of his soil in its natural condition, and no person is entitled to so excavate upon his own land as to deprive the soil of his neighbor of its natural support and thereby cause it to slide into the excavation.<sup>58</sup> This right extends only to the soil, and not to improvements placed upon it which increase the weight.<sup>59</sup> If, in the execution of public works under authority of law, excavations are made and the soil of an individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and the individual is entitled to compensation for the resulting damage. The right of lateral support is a part of his property in the land, as much so as his right of user, or of exclusion. When he is deprived of it his property is taken

An. 401. But see *Egan v. Hart*, 45 La. An. 1358, 14 So. Rep. 244.

<sup>56</sup> See *Richardson v. Levee Comrs.*, 58 Miss. 539, 9 So. Rep. 351.

<sup>57</sup> *In re City of New Orleans*, 20 La. An. 394.

<sup>58</sup> *Thurston v. Hancock*, 12 Mass. 226; *Gilmore v. Driscoll*, 122 Mass. 199, 201; *Farrand v. Marshall*, 19 Barb. 380; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. Rep. 989; *Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. Rep. 84; *McCullough v. St. Paul etc. R. R. Co.*, 52 Minn. 12, 53 N. W. Rep. 802; *Stearns' Exrs. v. City of Richmond*, 88 Va. 992, 14 S. E. Rep. 847, 6 Am. R. R. & Corp. Rep. 247; *Washburn on Easements*, pp. 514-516; *Wood on Nuisances*, § 172, and cases cited

below. In *Gilmore v. Driscoll*, the court (Gray, C. J.,) say: "Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition.

\* \* \* In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, he may maintain an action against him, without proof of negligence."

<sup>59</sup> *Lasala v. Holbrook*, 4 Paige, 169; *City of Quincy v. Jones*, 76 Ill. 231; *Wood on Nuisances*, § 175; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. Rep. 989.

just as much as if his property was invaded. Notwithstanding the clear justice and logic of this position, there is, perhaps as much authority against it as for it. It has been held that, where a railroad company excavated upon its own land, so that the plaintiff's soil slid into the excavation, the plaintiff was entitled to recover damages.<sup>60</sup> The contrary doctrine has been held in precisely similar cases in Maine and Kentucky.<sup>61</sup> In both these cases the railroad companies obtained title by deed, in the usual form. In Maine a recovery was denied, on the ground that the act of the legislature was an authority and license to the company to construct the road in the manner it did, and, as it had not been guilty of negligence, no action would lie. The court say: "It is a principle of the common law that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil, and render it liable to break away and slide down of its own weight; but this principle does not apply to excavations made in pursuance of a license; and a license from the legislature, if within its constitutional limits, affords as ample protection as a license from the injured party." The right of support was thus conceded to exist. This right was property, and the legislature could not license a railroad company to take away the plaintiff's property without an equivalent as required by the constitution. Such a license was not "within its constitutional limits." In the Kentucky case a recovery was denied, on the ground that the plaintiff sold the right of way to the company for use as a right of way, and it must be presumed that he estimated and obtained the damages which would result from such use. But the grant of land even to be excavated for materials does not authorize the grantee to deprive the adjoining

<sup>60</sup> Richardson v. Vermont Central R. R. Co., 25 Vt. 465; Ludlow v. Hudson River R. R. Co., 6 Lans. 128; and see New Orleans, Baton Rouge etc. R. R. Co. v. Brown, 64 Miss. 479; Kopp v. Northern Pac. R. R. Co., 41 Minn. 310, 43 N. W. Rep. 73;

McCullough v. St. Paul etc. R. Co., 52 Minn. 12, 53 N. W. Rep. 802.

<sup>61</sup> Boothby v. Androscoggin & Kennebec R. R. Co., 51 Me. 318; Hortsman v. Covington & Lexington R. R. Co., 18 B. Mon. 218. Compare City of New Westmin-

land of the grantor of its support.<sup>62</sup> The grant of land for a railroad or other public use is simply a grant of the land, as land, and it is still subject to the same obligations in respect to adjacent or neighboring land as if granted to a private individual for private use.<sup>63</sup>

Where the grade of a street is cut down and the soil of the abutting owner slides into the street, he is entitled to recover.<sup>64</sup> But this question, so far as it relates to streets, is discussed elsewhere.<sup>65</sup> Where a city excavated in the bed of a river, to form a basin for the settling of sewerage, and thus deprived plaintiff's land of its support, it was held liable.<sup>66</sup> So where the city in digging a sewer removes quicksand by pumping and damages the abutting property by depriving it of support.<sup>67</sup> In case of interfering with the right of support, the action accrues when the damage results, and not when the excavation is made.<sup>68</sup>

§ 151a. Consequential injuries to property by the operation of a railroad: Noise, smoke, cinders, jarring, vibrations, etc.—When part of a tract of land is taken for a railroad just compensation includes damage to the remainder by reason of the use of the part taken for railroad purposes.<sup>69</sup> When such compensation has been paid the railroad company acquires the right to operate its road in the usual way without any further liability to the owner of such remainder for damage or inconvenience resulting

ster v. Brighthouse, 20 Duvall, 520, where a city was held liable for taking away the support of plaintiff's soil in lowering the grade of a street.

<sup>62</sup> Ryckman v. Gillis, 6 Lans. 79; Ludlow v. Hudson River R. Co., 6 Lans. 128.

<sup>63</sup> Post, §§ 566, 569.

<sup>64</sup> Dyer v. St. Paul, 27 Minn. 457; Armstrong v. St. Paul, 30 Minn. 299; Keating v. Cincinnati, 38 Ohio St. 141; City of Aurora v. Fox, 78 Ind. 1; Moore v. Albany, 98 N. Y. 396; Columbus v. Willard, 7 Ohio

C. C. 113; City of New Westminster v. Brighthouse, 20 Duvall, 520; Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. Rep. 84; Stearns Extra. v. City of Richmond, 88 Va. 992, 14 S. E. Rep. 847, 6 Am. R. R. & Corp. Rep. 247.

<sup>65</sup> Ante § 101.

<sup>66</sup> Pomroy v. Granger, 18 R. I. 624, 29 Atl. Rep. 690.

<sup>67</sup> Cabot v. Kingman, 166 Mass. 403, 44 N. E. Rep. 344.

<sup>68</sup> Ludlow v. Hudson River R. Co., 6 Lans. 128.

<sup>69</sup> Post, § 464.

therefrom. But railroads are frequently constructed adjacent, or in close proximity, to land no part of which has been taken. Such land may be damaged and depreciated by the proximity of the railroad, and by the noise, smoke, cinders, jarring, vibrations and other annoyances arising from the operation of the road. According to the general principles heretofore enunciated, if such damages would be actionable but for the statutory authority, then they amount to a taking, for which compensation must be made.<sup>70</sup> But the authorities are not harmonious upon this point. In a suit brought to recover for damage to the plaintiff's property, no part of which had been taken, caused by the noise, smoke, cinders, vibrations, etc., resulting from the use of railroad tracks on adjacent property, the supreme court of Minnesota denied a recovery and state their reasons, as follows: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skillful and careful manner causes to the public necessary inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. For instance, one whose premises lie within a hundred feet of the railroad will feel the inconveniences in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible."<sup>71</sup> The question has recently received very elaborate

<sup>70</sup> Ante, § 56.

<sup>71</sup> Carroll v. Wis. Cent. R. R. Co., 40 Minn. 168, 41 N. W. Rep. 661. See also the following cases

in the same court: Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 39 N. W. Rep. 629; Cameron v. Chicago etc. R. R. Co., 47

consideration in New Jersey. The railroad was in the rear of plaintiff's lot upon elevated tracks. The complaint was for nuisance in the use of the tracks, resulting from noise, smoke, smells, etc., caused by switching, making and unmaking trains, leaving cars standing in the vicinity loaded with stock and the like. The company pleaded its statutory authority, and alleged that its road was operated with no unnecessary injury to the plaintiff. The plea was held good on demurrer.<sup>72</sup> It was conceded that the acts

Minn. 75, 43 N. W. Rep. 785; *Kaje v. Chicago etc. R. R. Co.*, 57 Minn. 422, 59 N. W. Rep. 493.

<sup>72</sup> *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, 13 Atl. Rep. 164. The judgment of the supreme court was affirmed by the court of errors and appeals on the opinion of the former court, so that the opinion has the sanction of both courts. 52 N. J. L. 221, 20 Atl. Rep. 169 (1890). We quote from the opinion as follows: "It is a radical error to regard these corporations as simply private. They have a public as well as a private aspect, and it is on this account that the immunity in question belongs to them. \* \* \* These roads, in view of their effect upon social and commercial interests, are of vastly more importance than are most of the public highways, and it is on account of this transcendent usefulness that they, to a large extent, have been and must be regarded as public agencies. Looking at them in this light, it is but following the ordinary path to declare that they are not responsible for those incidental damages that result from the proper exercise of their func-

tions. This is the settled rule. The legislature may authorize the altering the grade of a city street; such act may occasion immense loss to the owners of abutting property, and such loss is *damnum absque injuria*, the reason being that the improvement is a matter of public concern, and that each individual member of the community, while he is entitled to its benefits, must submit to its burthens. The attitude of a railroad company, so far as relates to the application of legal principles, is not dissimilar. They run their trains by legislative authority for the public benefit, and on that account, in doing such acts, they are so far forth the representatives of the body of the people. The defendant alleges that it has kept entirely within the limits of its chartered rights in running its trains, and that the plaintiff has suffered no damage except such as is necessarily incident to such transactions, and it seems to me that if this be true this action cannot be maintained." (pp. 240, 241.) \* \* \* "Nor have I found any serious constitutional difficulty with reference to this question.

complained of amounted to an actionable nuisance but for the statutory authority, but it was held that the legislature had plenary control over the subject of "incidental" or "consequential" damages, though the same might amount to half the value of the property. Other courts have taken

It has not been unobserved that it is said that as the legislature cannot authorize, by force of the constitution of the state, property to be taken for public use without compensation, it follows that it cannot legalize an injury to such property. The argument is that to injure property for the public benefit to the extent say, of one-half of its value, is, in substance, to take for that purpose a moiety of it. But this line of reasoning excludes altogether, as it appears to me, the legislative control over the subject. As already remarked, if the right of action cannot be taken from the land owner when the injury to his property is equal to one-half its value, neither can this be done when it is damaged to the extent of one-twentieth part of its value, or in any other actionable degree. To hold otherwise would be not only illogical but impracticable, for who would be able to say to what degree the damage must go in order to give the right of action. In my opinion the legislative power covers the entire field of incidental injuries. In the case cited from the English reports it was held that the burning of a hay-stack by the engine of an unchartered company was a loss that could be redressed by action, without respect to the question whether

the fire had been kept with proper care or not; and yet the court declared, as has always been judicially declared in this state, that if such engine had been used under legislative authority such loss would have been remediless. This, it is evident, was maintaining a legislative right to deprive a person of a right of action due to him at common law for an injury resulting in the entire destruction of his property, and this is the legal principle that has practically been enforced in this state from the existence of its first railroad up to the present hour. And it is this entire doctrine that must be abrogated if we say that by force of the constitution the legislature cannot exempt these companies from responsibility for those things that are the necessary concomitants of the use of the road. When property has been incidentally injured, no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use. All the public improvements in the state have been built and are now resting on this foundation. For my part, therefore, I find no embarrassment in disposing of

a similar view.<sup>73</sup> In the case of railroads in streets there is a difference of opinion, whether damages should be allowed for the annoyances occasioned by noise, smoke and vibrations.<sup>74</sup> In the New York elevated railroad cases it

the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office; for to me it does not appear to be consistent with reason to declare that these exemptions may be bestowed upon an inconsiderable turnpike company but cannot be given in favor of these great highways connecting distant countries and extending over a continent." pp. 244-246. In the prior cases of *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, and *Pennsylvania R. R. Co. v. Thompson*, 45 N. J. Eq. 870, 14 Atl. Rep. 397, 19 Atl. Rep. 622, both decided by the court of errors and appeals, similar injuries were held to be actionable, but the tracks in these cases were in a public street and the use complained of was held to be in excess of the authority granted to the railroad company. *Beldeman v. Atlantic City R. R. Co.*, 19 Atl. Rep. (N. J. Ch.) 731 is similar to the *Beseman* Case, and is decided in accordance therewith. Compare *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810; *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. Rep. 374.

<sup>73</sup> *Densmore v. Central Ia. R. R. Co.*, 72 Ia. 182; *Werges v. St. Louis etc. R. R. Co.*, 35 La. An. 641; *Decker v. Evansville Sub-*

*urban etc. R. R. Co.*, 133 Ind. 493, 33 N. E. Rep. 349. In the latter case the court says: "Injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery, in the absence of a statute entitling the owner to maintain such action." *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. Rep. 489 and *Essex v. Local Board for Acton*, L. R. 14 H. L. 153 (S. C. 14 Q. B. D. 753, 17 Q. B. D. 447), though not relating to railroads, are important in the general discussion of the points involved.

<sup>74</sup> The following cases favor the allowance of such damages: *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Wilson v. Des Moines etc. R. R. Co.*, 67 Ia. 509; *Mix v. La Fayette etc. R. R. Co.*, 67 Ill. 319; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush. 382; *Fulton v. Short Route R. Trans. Co.*, 85 Ky. 640, 4 S. W. Rep. 332; *Louisville & N. R. R. Co.*, 91 Ky. 109, 15 S. W. Rep. 8; *Maysville & B. S. R. Co. v. Ingram*, (Ky.) 30 S. W. Rep. 8. Contra: *Werges v. St. Louis etc. R. R. Co.*, 35 La. An. 641; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 39 N. W. Rep. 629; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Parrott v. Cincinnati*

is held that such damages may be recovered where the occupation of the railroad company is wrongful, but cannot be considered in estimating the just compensation to be paid for the permanent interference with the abutter's easements.<sup>75</sup> Such damages may be recovered under constitutions which give compensation for property damaged or injured for public use, whether the railroad is on a public street or its private property.<sup>76</sup> The maintaining and use of coal chutes or bins for coaling engines, in the immediate vicinity of plaintiff's property, has been held to be an actionable nuisance in New York and Illinois,<sup>77</sup> but the con-

etc. R. R. Co., 10 Ohio St. 624.  
And see post, §§ 493, 493a.

<sup>75</sup> American Bank Note Co. v. New York El. R. R. Co., 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; Messenger v. Manhattan R. R. Co., 129 N. Y. 502, 29 N. E. Rep. 955; Bischoff v. New York El. R. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073; Sperb v. Metropolitan El. R. R. Co., 137 N. Y. 155, 32 N. E. Rep. 1050, 7 Am. R. R. & Corp. Rep. 554; Sperb v. Metropolitan El. R. R. Co., 61 Hun 539, 41 N. Y. St. 155, 16 N. Y. Supp. 392; Sloan v. New York El. R. R. Co., 63 Hun 300, 44 N. Y. St. 583, 17 N. Y. Supp. 769; Jordan v. Metropolitan El. R. R. Co., 60 N. Y. Supr. 385; Golden v. Metropolitan El. R. R. Co., 1 Misc. 142, 20 N. Y. Supp. 630; Purdy v. Manhattan R. R. Co., 3 Misc. 50, 22 N. Y. Supp. 943; Diehl v. Metropolitan El. R. R. Co., 11 Misc. 14, 31 N. Y. Supp. 839.

<sup>76</sup> Chicago etc. R. R. Co. v. Darke, 148 Ill. 226, 30 N. E. Rep. 750, 9 Am. R. R. & Corp. Rep. 73; Chicago etc. R. R. Co. v. Leah, 152 Ill. 249, 38 N. E. Rep. 556; Wisconsin Central R. R. Co.

v. Wieczorek, 51 Ill. App. 498; Lake Erie & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. Rep. 78; Chicago K. & N. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. Rep. 478, 3 Am. R. R. & Corp. Rep. 268; Omaha etc. R. R. Co. v. Moschel, 38 Neb. 281, 56 N. W. Rep. 875; Gainville etc. R. R. Co. v. Hall, 78 Tex. 16, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. Rep. 620; Gulf etc. R. R. Co. v. Necco, (Tex.) 15 S. W. Rep. 1102. The contrary is held in Pennsylvania. Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. Rep. 871; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690; Dooner v. Pennsylvania R. R. Co., 142 Pa. St. 36, 21 Atl. Rep. 755; Jones v. Erie & W. R. R. Co., 151 Pa. St. 30, 25 Atl. Rep. 134; Pennsylvania Co. for Insurance v. Pennsylvania S. V. R. R. Co., 151 Pa. St. 334, 25 Atl. Rep. 107.

<sup>77</sup> Spring v. Delaware etc. R. R. Co., 88 Hun 385, 34 N. Y. Supp. 810; Wiley v. Elwood, 134 Ill.



trary in Iowa.<sup>78</sup> The maintenance of stock yards by a railroad company near the plaintiff has been held an actionable nuisance in Iowa and Missouri.<sup>79</sup> Where a railroad company located its engine house and repair shops close to a church, it was held a recovery could be had for the annoyances and damage caused by the noise, smoke, cinders, etc.<sup>80</sup>

Engine houses, repair shops, stock yards and coal chutes are just as necessary appurtenances to a railroad as switch yards and sidetracks. The power of eminent domain can be exercised for the one as well as for the other.<sup>81</sup> They are all alike authorized by the legislature. The annoyances which result from them are of the same general character, and there seems to be no good ground for distinguishing between them. The cases which have been cited, therefore, are really in conflict, and the better rule undoubtedly is that when the tracks and appurtenances of a railroad are so used and managed as to be a nuisance to adjoining property, no part of which has been taken, the owner may recover the damage sustained, and it is no answer to say that the acts which create the nuisance have been authorized by the legislature, since the legislature cannot authorize the taking of property without compensation.

In England there can be no recovery for such damages, unless allowed by statute, because there is no higher law than an enactment of the legislature.<sup>82</sup> But an act of

281, 25 N. E. Rep. 570. So of a turntable. *Garvey v. Long Island R. R. Co.*, 9 App. Div. 254, 41 N. Y. Supp. 397; *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323, 54 N. E. Rep. 57. See *Cleveland etc. R. R. Co. v. Patterson*, 67 Ill. App. 351.

<sup>78</sup> *Dunsmore v. Central Ia. R. R. Co.*, 72 Ia. 182.

<sup>79</sup> *Shirely v. Cedar Rapids etc. R. R. Co.*, 74 Ia. 169, 37 N. W. Rep. 133; *Bielman v. Chicago etc. R. R. Co.*, 50 Mo. App. 152. But

see *London etc. R. R. Co. v. Truman*, L. R. 11 H. L. 45.

<sup>80</sup> *Baltimore & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Baltimore & P. R. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 S. C. Rep. 185. In *Porterfield v. Bond*, 38 Fed. Rep. 391, the plaintiff recovered for damages caused by vibrations produced by trains running past his premises at a prohibited speed.

<sup>81</sup> Post § 170.

<sup>82</sup> See ante § 93.

Parliament, which authorizes what would otherwise be a nuisance, without providing for compensation to those injured, is declared by the courts to be harsh legislation.<sup>83</sup>

§ 152. **Polluting the atmosphere.**—The owner of land has a right that the air which comes upon his premises shall come in its natural condition, free from artificial impurities.<sup>84</sup> This right has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor dust, smoke, noxious gases or other foreign matter which substantially affect its wholesomeness.<sup>85</sup> This right is very fully treated by Mr. Wood in his work on Nuisances, and a reference thereto will suffice.<sup>86</sup> The right to pure air is property, and to interfere with the right for public use is to take property.<sup>87</sup> "There can be no question that the erection

<sup>83</sup> "I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighboring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature. No doubt when compensation is not given to those interested in the neighboring land, this is, as against them, harsh legislation." *Blackburne J. in London etc. R. R. Co. v. Truman*, L. R. 11 H. L. 45, 60. See also *Essex v. Local Board for Acton*, L. R. 14 H. L. 153; *S. C.* 14 Q. B. D. 753, 17 Q. B. D. 447; *Rex v. Pease*, 4 B. & A. 30, 24 E. C. L. R. 24; *Attorney General v. Metropolitan R. R. Co.*, L. R. (1894) 1 Q. B. D. 384.

<sup>84</sup> *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. Rep. 900; *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 25 N. E. Rep. 246, 3 Am. R. R. & Corp. Rep. 318; *State v. Luce*, 9 Houston, 396; *Wood on Nuisance*, §§ 469, 494.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Wood on Nuisances*, Chapters 13 and 14.

<sup>87</sup> *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316; *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N. Y. 10; *Abendroth v. Manhattan El. Ry. Co.*, 19 Abb. N. C. 247; *Caro v. Same*, 46 N. Y. Supr. Ct. 138. But see *Briesen v. Long Island R. R. Co.*, 31 Hun 112. In *Cogswell v. New York etc. R. R. Co.* the court intimated pretty clearly that it would hold it a taking to fill the atmosphere of one's premises with smoke, soot, gases, etc., if called upon to do

of gas works, or the setting up of any other noxious trade in the vicinity of my premises, that emits noxious odors, which are sent over my lands in quantity and volume, sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of my property as the legislature may not permit without compensation. What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track or a gas house, and invading it by an agency that operates as an actual abridgement of its beneficial use, and possibly a complete and practical ouster? There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet a pernicious, agency, that seriously impairs its use and enjoyment, as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident of the land, annexed to and a part of it, and it is as sacred as my right to the land itself. Therefore, I apprehend that the legislature has no power to shield one from liability for all the consequences of the exercise of an occupation that produces such results any more than it has to authorize the flooding of my lands or the permanent diversion of a

so, but decide the case on other grounds. In *Pennsylvania R. R. Co. v. Angel* the court say: "But, secondly, an act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit, as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the

owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill

stream."<sup>88</sup> Legislative authority to carry on a business does not authorize it to be carried on in such a manner or at such a place that it will be a nuisance to neighboring property.<sup>89</sup> An act which authorized a particular business at a particular place which necessarily defiled the air so as to create a nuisance would be void unless it was for public use, and, if for public use, such as manufacturing gas for a city, would be subject to the constitutional limitation of making compensation.<sup>90</sup> Where a city discharges sewerage into a pond or stream or otherwise, so as to create a nuisance, it will be liable.<sup>91</sup> So where a railroad company so constructs its road as to create a stagnant

one's dwelling with smells and noise so that it can not be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense. Of course, mere statutory authority will not avail for such an interference with private property." p. 329.

<sup>88</sup> Wood on Nuisances, 1st Ed. § 755.

<sup>89</sup> N. W. Fertilizing Co. v. Hyde Park, 70 Ill. 634, affirmed, 97 U. S. 659; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. Rep. 246, 3 Am. R. R. & Corp. Rep. 318; Board of Health v. Lederer, 52 N. J. L. 675, 29 Atl. Rep. 444.

<sup>90</sup> Wood on Nuisances, § 750. And generally where, in the construction and operation of public works, a nuisance is created, an action will lie. Central R. R. Co. v. English, 73 Ga. 366; Quinn

v. Chicago B. & Q. R. R. Co., 63 Ia. 510; Gould v. Rochester, 105 N. Y. 46; Morgan v. Binghamton, 32 Hun 602; Suffolk v. Parker, 79 Va. 660.

<sup>91</sup> Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. Rep. 437; Dierks v. Comrs. of Highways, 142 Ill. 197, 31 N. E. Rep. 496; City of Jacksonville v. Doan, 145 Ill. 23, 33 N. E. Rep. 878; City of Champaign v. Forrester, 29 Ill. App. 117; City of Jacksonville v. Doan, 48 Ill. App. 247; Loughran v. Des Moines, 72 Ia. 382; Randolph v. Bloomfield, 77 Ia. 50, 41 N. W. Rep. 562; Middlesex Co. v. City of Lowell, 149 Mass. 509, 21 N. E. Rep. 872; Bacon v. Boston, 154 Mass. 100, 28 N. E. Rep. 9; Edmundson v. City of Moberly, 98 Mo. 523, 11 S. W. Rep. 990. And see Titus v. City of Boston, 161 Mass. 209, 36 N. E. Rep. 793; Robb v. Village of La Grange, 57 Ill. App. 386; Barrett v. Mt. Greenwood Cem. Assn., 57 Ill. App. 401; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. Rep. 489; Essex v. Local Board for Acton, L. R. 14 H. L. 153; S. C. 14 Q. B. D. 753, 17 Q. B. D.

pool, which becomes a nuisance to adjacent property.<sup>92</sup> Where a city used land of its own for crushing stone and injured the plaintiff by the dust sent into his atmosphere and deposited upon his land, it was held liable.<sup>93</sup> But where a city acquired land across the street from the plaintiff and built thereon an embankment and bridge from which dust and dirt were projected upon the plaintiff's lot, the city was held not liable, the court treating the question as one of statutory construction only.<sup>94</sup> Where a municipal water or light plant creates a nuisance by reason of gas, smoke, cinders, etc., an action will lie.<sup>95</sup>

§ 152a. Where the public use of land produces a physical or structural injury to adjacent land. Disturbance of the soil by pressure, vibration, flooding or percolation.—In *Hennessey v. Carmony*,<sup>1</sup> the vice chancellor says: "Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it." But it may be doubted whether there is any good ground, either in legal principles or physical science, for such a distinction. A land owner's right in the space above the surface are quite as important and valuable as his rights in or below the surface, or in structures upon the land. In order to be secure in the en-

447; *Owens v. Lancaster*, 182 Pa. St. 257; *Bloomington v. Costello*, 65 Ill. App. 407.

<sup>92</sup> *Louisville & N. R. R. Co. v. Finley*, 86 Ky. 294, 5 S. W. Rep. 753; *Atlanta & F. R. R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. Rep. 277; *Lockett v. Ft. Worth & R. G. R. Co.*, 78 Tex. 211, 14 S. W. Rep. 564.

<sup>93</sup> *Waldron v. Haverhill*, 143 Mass. 532. See *Chicago-Virden Coal Co. v. Wilson*, 67 Ill. App. 443.

<sup>94</sup> *Rand v. City of Boston*, 164

Mass. 354, 41 N. E. Rep. 484.

<sup>95</sup> *Hyde Park T. H. & Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206, S. C. 64 Ill. App. 152; *Churchill v. Burlington Water Co.*, 94 Ia. 69, 62 N. W. Rep. 646; *Matthews v. Stillwater G. & E. L. Co.*, 63 Minn. 493, 65 N. W. Rep. 947; *Greenville v. Alland* (Tex. Cir. App.), 27 S. W. Rep. 292.

<sup>1</sup> 50 N. J. Eq. 616, 25 Atl. Rep. 374. And see *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810.

joyment of his property he needs the same protection for the one sort of rights as for the other. What valid distinction can be made between discharging smoke or noxious gases into the atmosphere which find their way into the air of the adjoining lot and cause a nuisance, and the discharge of water or noxious liquids which flow upon adjoining property or percolate through its soil so as to create a nuisance upon the land?<sup>2</sup> The operation of machinery may communicate vibrations to the air which make life a burden to those in the neighborhood by reason of the noise so produced, and at the same time may communicate vibrations to the land, which crack the walls and shake down the plaster of the houses in which they live. How can a distinction be made between the two, when both kinds of injury go to the extent of materially impairing the use and enjoyment of the property?

Where a railroad company builds an embankment on its own land, which, owing to the yielding nature of the subsoil, settles, and, by lateral pressure, causes an upheaval of the adjacent land, it will be liable for the damage.<sup>3</sup> Where a city erected a pumping station, upon a lot adjoining plaintiff's, which damaged his property by noise and vibrations, it was held the city was liable, not on the ground of a taking, but on the ground that the legislative authority did not authorize the works where they would be a nuisance, and, therefore, that the city should have selected a different location or acquired

<sup>2</sup> In *Hauck v. Tide Water Pipe Line Co.*, 153 Pa. St. 366, 26 Atl. Rep. 644, which was a suit for damages caused by oil which had escaped from the pipes of the defendant and percolated through the soil to the plaintiff's springs, the court says: "The appellant attempted to distinguish this case from *Robb v. Carnegie*, by the fact that in the latter case the smoke and gases from the works were carried by the wind, and lodged upon the plaintiff's

land; while in the latter case the escaping oil merely percolated through the soil until it reached plaintiff's springs. The essential difference between being carried through the air and percolating through the soil has not been made to appear. We regard it as a distinction without a difference."

<sup>3</sup> *Herbert v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 21, 10 Atl. Rep. 872; *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233,

more land.<sup>4</sup> A recovery has been allowed for vibrations caused by an electric light plant.<sup>5</sup> Where a railroad company builds a fence upon its own land to protect its tracks from snow, it is not liable for an accumulation of snow on the adjoining land caused by the same fence.<sup>6</sup> Injuries to land by flooding it with water, by interfering with the flow of water, or by the percolation of noxious substances, has been considered in a former chapter.<sup>7</sup>

§ 152b. If the use of property for public purposes produces a nuisance, those injured are entitled to compensation.—This proposition is sustained by many of the cases cited in the preceding sections. It is immaterial whether the particular use of the particular property is authorized by the legislature or not. The right not to be injured by a nuisance on adjoining land cannot be taken without compensation. This seems to us the only logical conclusion.<sup>8</sup> The Massachusetts court has held that "the legislature may authorize small nuisances without compensation, but not great ones."<sup>9</sup> But where is the line to be drawn? The courts of New Jersey, perceiving this difficulty, have held that it cannot be drawn anywhere, and have hence con-

23 Atl. Rep. 810; *Roushlang v. Chicago & A. R. R. Co.*, 115 Ind. 106, 17 N. E. Rep. 198.

<sup>4</sup> *Morton v. New York*, 140 N. Y. 207, 35 N. E. Rep. 490, affirming 65 Hun, 32, 47 N. Y. St. 64, 19 N. Y. Supp. 603. But temporary annoyances of the same kind, while building a tunnel, were held to be *damnum absque injuria*, in *Lester v. New York*, 79 Hun, 479, 29 N. Y. Supp. 1000, though they were continued for nearly three years.

<sup>5</sup> *Shelfer v. City of London Electric Lighting Co.*, L. R. (1895), 1 Ch. D. 287.

<sup>6</sup> *Carron v. Western R. R. Co.*, 8 Gray, 423.

<sup>7</sup> See chap. iv; also *Athens*

*Mfg. Co. v. Rucker*, 80 Ga. 292; *Stone v. Augusta*, 46 Me. 127; *Rise v. City of Flint*, 67 Mich. 401, 34 N. W. Rep. 719; *Mundy v. New York etc. R. R. Co.*, 75 Hun, 479, 27 N. Y. Supp. 469; *Riddle's Exs. v. Delaware County*, 156 Pa. St. 643, 27 Atl. Rep. 569; *High Bridge Lumber Co. v. United States*, 69 Fed. Rep. 320, 16 C. C. A. 460; *Hauck v. Tide Water Pipe Line Co.*, 153 Pa. St. 366, 26 Atl. Rep. 644; *Broadbent v. Imperial Gas Co.*, 7 De G. M. N. & G. 436; *Imperial Gas Co. v. Broadbent*, 7 H. L. Cas. 600; *Bacon v. Boston*, 154 Mass. 100, 28 N. E. Rep. 9.

<sup>8</sup> Ante, §§ 56 et seq., 151a-152a.

<sup>9</sup> *Bacon v. Boston*, 154 Mass.

cluded that the legislature can authorize all nuisances, both great and small.<sup>10</sup> But it is certainly more logical, more just and more in keeping with the trend of modern decisions to hold that no right of property can be taken, destroyed or materially impaired, without compensation. Numerous decisions, cited in this and the last three chapters, support this conclusion, and it is unnecessary to repeat them.<sup>11</sup>

§ 153. **Miscellaneous decisions as to what constitutes a taking.**—A leasehold interest in public property derived from the State cannot be taken without compensation.<sup>12</sup> A right to recover for flowage is a valuable right of property, within the protection of the constitution.<sup>13</sup> But one has no such vested right in an award of damages for property taken for public use as will prevent the legislature from authorizing a court to set it aside for good cause shown.<sup>14</sup> The unauthorized use of a patented machine by the government is not a taking, but a mere infringement of a patent right.<sup>15</sup> Fixing the maximum of fees to be allowed an attorney for defending a pauper charged with crime, does not violate the constitution as to the taking of private property for public use.<sup>16</sup> One who furnishes books to a State under a contract for less than they are worth, has no claim against the State for the difference on the ground that his property has been taken for public use.<sup>17</sup>

An act authorizing the sale of lands held in joint tenancy, tenancy in common and coparcenary,<sup>18</sup> or the real

100, 102, 28 N. E. Rep. 9.

<sup>10</sup> *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. Rep. 164. See statement and quotations from the case, ante, § 151a, note 72.

<sup>11</sup> See also *Kobbe v. New Brighton*, 23 App. Div. N. Y. 243, where a village crematory was enjoined as a nuisance.

<sup>12</sup> *McCauley v. Waller*, 12 Cal. 500; *Same v. Brooks*, 16 Cal. 11.

<sup>13</sup> *Neponset Meadow Co. v. Tilleson*, 133 Mass. 189.

<sup>14</sup> *Matter of Widening Broadway*, 61 Barb. 483.

<sup>15</sup> *Pitcher v. United States*, 1 Ct. of Cl. 7.

<sup>16</sup> *Samuels v. County of Du- buque*, 13 Ia. 536.

<sup>17</sup> *Shoals v. State*, 2 Chand. Wis. 182.

<sup>18</sup> *Richardson v. Munson*, 23 Conn. 94.



estate of minors,<sup>19</sup> is not invalid. Where land is held in trust or for life with remainder over, it has been held that the legislature may authorize the sale of the land and the application of the proceeds according to the rights of the parties.<sup>20</sup> A law giving an occupying claimant the option of purchasing the land or selling the improvements, after judgment against him in ejectment, was held invalid as a taking.<sup>21</sup> So of a law authorizing a court to confirm and make valid a deed previously executed by a married woman, which was not properly acknowledged.<sup>22</sup> The legislature has no power to authorize the sale of private property, for other than public uses, without the consent of the owner, except in cases of necessity, arising from the infancy, insanity, or other incompetency of those in whose behalf it acts.<sup>23</sup> An act compelling the city of Boston to transfer a cemetery to a private corporation was held invalid.<sup>24</sup> The property of a private eleemosynary institution cannot be taken away from it by the legislature.<sup>25</sup> An act that, when a town is divided, part of the property of the old town shall belong to the new, does not violate the constitution.<sup>26</sup> An act allowing the building of a party wall partly on the adjoining land of another is not a taking.<sup>27</sup> The legislature may provide that the lien of a special assessment shall take precedence of a prior mortgage.<sup>28</sup> Where vessels, being suspected of being about to sail on a marauding expedition, are detained in accordance with the provisions of a

<sup>19</sup> *Rice v. Parkman*, 16 Mass. 326.

<sup>20</sup> *Norris v. Clymer*, 2 Pa. St. 277; *Sohler v. Mass. General Hospital*, 3 Cush. 483, 496; *Lindsay v. Hubbard*, 44 Conn. 109.

<sup>21</sup> *McCoy v. Grandy*, 3 Ohio St. 463.

<sup>22</sup> *Pearce's Heirs v. Patton*, 7 B. Mon. 162, 167.

<sup>23</sup> *Powers v. Bergen*, 6 N. Y. 358.

<sup>24</sup> *Proprietors of Mt. Hope Cemetery v. City of Boston*, 158

Mass. 509, 33 N. E. Rep. 695. See also *People v. Porter*, 26 Hun, 622; *Board of Regents v. Painter*, 102 Mo. 464, 14 S. W. Rep. 938; *Webb v. New York*, 64 How. Pr. 10.

<sup>25</sup> *Board of Education v. Bakewell*, 122 Ill. 339.

<sup>26</sup> *Bristol v. New Chester*, 3 N. H. 533.

<sup>27</sup> *Hunt v. Arnbruster*, 17 N. J. Eq. 208.

<sup>28</sup> *Murphy v. Beard*, 138 Ind. 560, 39 N. E. Rep. 33.

statute, there is no taking within the constitution.<sup>29</sup> The discontinuance of a railroad is not a taking of the property of those who are damaged thereby.<sup>30</sup> An act establishing the Torrens system of land transfers was held to be invalid for the reason, among others, that its operation would take private property for private use and without compensation.<sup>31</sup> The lessee of a stall in a city market was held to have no such estate therein as would enable him to maintain trespass against a railroad company taking possession under the power of eminent domain.<sup>32</sup> The legislature authorized a dam across the outlet of a creek in which the tide ebbed and flowed. The dam was built and maintained by the owners of meadows thereby reclaimed from overflow. After being maintained for nearly a hundred years, the legislature declared the creek navigable and ordered the removal of the dam. It was held that the dam was private property and could not be taken without compensation.<sup>33</sup> Drawing down a mill dam in order to repair a highway or bridge is not a taking.<sup>34</sup>

§ 154. **Damages from negligence.**—Damages resulting from negligence are always actionable. Consequently a recovery may be had for all damages which result from the negligent or improper construction or operation of public works.<sup>35</sup> Such damages are, of course, not a taking,

<sup>29</sup> *Graham v. United States*, 2 Ct. of Claims, 327. Where the Government had possession of a vessel under a charter party, which gave an option to purchase at an appraised value, and during such possession the vessel is destroyed by the Government, it is to be deemed a taking under the contract and not under the eminent domain power. *Bogert v. United States*, 2 Ct. of Claims, 159.

<sup>30</sup> *Kinealy v. St. Louis etc. R. R. Co.*, 69 Mo. 658.

<sup>31</sup> *State v. Gullbert*, 56 Ohio St. 575. But see *People v. Simon*, 176 Ill. 165, 52 N. E. Rep. 910.

<sup>32</sup> *Strickland v. Pennsylvania R. R. Co.*, 154 Pa. St. 348, 26 Atl. Rep. 431.

<sup>33</sup> *Glover v. Powell*, 10 N. J. Eq. 211.

<sup>34</sup> *East Montpelier v. Wheelock*, 70 Vt. 391, 41 Atl. Rep. 432; *Aitken v. Wells River*, 70 Vt. 309, 40 Atl. Rep. 829.

<sup>35</sup> *Waterman v. Connecticut etc. R. R. Co.*, 30 Vt. 610; *Blood v. Nashua & Lowell R. R. Co.*, 2

and are not included in the award of compensation.<sup>36</sup>

§ 155. Taking under the guise of taxation.—We have already distinguished the eminent domain power from that of taxation.<sup>37</sup> Many attempts have been made to invalidate a tax on the ground that it was a violation of the constitutional provision prohibiting the taking of private property for public use without just compensation. But, with a few exceptions, it has generally been held that this limitation has no application to the taxing power. The limitations upon that power are to be found in the nature of the power itself, and in other provisions of the constitution having express reference to taxation.<sup>38</sup> Accordingly it has been held that a water tax,<sup>39</sup> a tax to pay bounties to soldiers,<sup>40</sup> or a tax in aid of a railroad or similar public works,<sup>41</sup> or upon the franchises or business of a corporation,<sup>42</sup> is not a taking of private property under the eminent domain power.

Gray, 137; Estabrooks v. Peterborough & Shirley R. R. Co., 12 Cush. 224; Johnson v. Atlantic & St. Lawrence R. R. Co., 35 N. H. 569; Terre Haute & Indiana R. R. Co. v. McKinley, 33 Ind. 274; Delaware etc. Canal Co. v. Lee, 22 N. J. L. 243; Bellinger v. New York Central R. R. Co., 23 N. Y. 42; Robinson v. New York & Erie R. R. Co., 27 Barb. 512.

<sup>36</sup> Cases in last note. Post, §§ 482, 574; Board of Comrs. v. State, 147 Ind. 476.

<sup>37</sup> Ante, § 4.

<sup>38</sup> Cooley on Taxation, chap. 3.

<sup>39</sup> Allen v. Drew, 44 Vt. 174.

<sup>40</sup> State v. Demarest, 32 N. J. L. 528; Booth v. Woodbury, 32 Conn. 118.

<sup>41</sup> Gibbons v. Mobile & Great Northern R. R. Co., 36 Ala. 410; Stein v. Mobile, 24 Ala. 591; President & Coms. of Revenue v. State, 45 Ala. 399; Stewart v.

Supervisors of Polk County, 30 Ia. 9; Aurora v. West, 9 Ind. 74; Clarke v. Rochester, 24 Barb. 446; Grant v. Courter, 24 Barb. 232; Gibson v. Mason, 5 Nev. 283, 303; C. W. etc. R. R. Co. v. Clinton County, 1 Ohio St. 101-2; Norris v. City of Waco, 57 Tex. 635; Gilman v. Sheboygan, 2 Black, 510; Pine Grove v. Talcott, 19 Wall. 666; County of Mobile v. Kimball, 102 U. S. 691.

<sup>42</sup> Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 S. C. Rep. 403. A tax on telegraph poles in streets, is valid. St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 S. C. Rep. 485, 7 Am. R. R. & Corp. Rep. 589; St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 S. C. Rep. 990; Postal Tel. Cable Co. v. Baltimore, 79 Md. 502, 29 Atl. Rep. 819. See Hodges v. Western Union Tel. Co., 72 Miss. 910, 18 So. Rep. 84.

The only instances in which a proposed tax has been held to be a taking, and so within the limitations imposed upon the exercise of the power of eminent domain by the legislature, are special assessments for local improvements and the taxation of farming lands for municipal purposes.<sup>43</sup> We have discussed the question in reference to special assessments in a former chapter.<sup>44</sup> A sale of property to pay a special assessment or any other tax is not a taking.<sup>45</sup>

It has been held in Kentucky that lands used simply for agricultural purposes cannot be annexed to a city and subjected to the payment of municipal taxes, for the reason that such a tax is an attempt to take private property for public use without just compensation, and is therefore void.<sup>46</sup>

<sup>43</sup> See, as to license tax, *Livingston v Paducah*, 80 Ky. 656.

<sup>44</sup> Ante, § 5. In *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. Rep. 368, it is held that "it is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation." Also that "the courts will not permit municipalities to evade the provision of the constitution that the property of no person shall be taken or damaged for public use without just compensation by paying the compensation, and then, under the guise of taxation, taking it back from the person entitled." To same effect: *Norwood v. Baker*, 172 U. S. 269; *Hutchinson v. Storrie*, 92 Tex. 685, 51 S. W. Rep. 848. But in *City of Covington v. Worthington*, 88 Ky. 206, 10 S. W. Rep. 790, 11 S. W. Rep. 1038, a street

was extended through the plaintiff's property, and he was assessed for benefits more than the amount of his damages, and the assessment was sustained. And see *Turner v. City of Detroit*, 104 Mich. 326, 62 N. W. Rep. 405. A statute authorizing a personal judgment for special assessments was held invalid as permitting a taking without compensation. *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. Rep. 521.

<sup>45</sup> *Williams v. Cammack*, 27 Miss. 209.

<sup>46</sup> *Cheaney v. Hooser*, 9 B. Mon. 330, 344; *Covington v. Southgate*, 15 B. Mon. 491; *Sharp v. Dunavan*, 17 B. Mon. 223; *Malthers v. Shields*, 2 Met. (Ky.) 553. In *Arbogast v. City of Louisville*, 2 Bush, 271, 275, 276, it is said: "When in the judgment of the legislature the interest of a suburban population demands local regulations, and the peace, tranquillity, and order of the public indicates that such is necessary, we cannot doubt its constitutional power to so enact, nor

These decisions have been followed in Iowa<sup>47</sup> and in an early case in Nebraska,<sup>48</sup> which latter case however was subsequently overruled.<sup>49</sup> An act authorizing a city to tax farming land outside of its limits, which was so situated as not to be benefited by the expenditure of the tax, was held void as an attempt to take property for public use without compensation.<sup>50</sup>

In Wisconsin it has been held that farming lands cannot be annexed to a village for the sole purpose of increasing its taxable property, and that the act of annexation itself was void.<sup>51</sup> The current of authority, however, as well as the reason of the matter, is clearly the other way.<sup>52</sup> Mu-

question its power to tax for such purposes the real as well as the personal estate of the people, nor the large as well as the small lots included therein; for it is more consonant with the entire genius, equality, and justice of our constitution and laws, that each should bear the burdens of that government which protects his person and property according to the worth of his estate, than to discriminate against the small in favor of the large property-holders. But whatever may be said of the intrinsic justice of such measures, there is no power in the courts to control this when the taxing power is conferred in good faith to uphold local government, and give police regulations to the population, and not merely to embrace taxable property for revenue purposes in order to lighten the burdens of others. And these are the principles heretofore announced and adhered to by this court through a train of decisions including the cases of *Cheaney v. Hooser*, 9 B. M. 330; *Sharp's ex'r v. Dunoven*,

17 B. M. 223; *Maltus v. Shields*, 2 Met. 553, and *Southgate v. Covington*, 15 B. M. 291. It is sometimes difficult to determine from the facts whether local government to a population or taxation for revenue purposes be the real incentive to the enactment; but when this is clearly manifested, then the proper application of the principle is not embarrassing." See also *Board of Trustees v. Gill*, 94 Ky. 138, 21 S. W. Rep. 579.

<sup>47</sup> *Morford v. Unger*, 8 Ia. 82; *Langworthy v. Dubuque*, 13 Ia. 86; *Same v. Same*, 16 Ia. 271; *Fulton v. Davenport*, 17 Ia. 404; *Buell v. Ball*, 20 Ia. 282.

<sup>48</sup> *Bradshaw v. Omaha*, 1 Neb. 16.

<sup>49</sup> *Turner v. Althaus*, 6 Neb. 54.

<sup>50</sup> *Territory of Utah v. Daniels*, 6 Utah 288, 22 Pac. Rep. 159.

<sup>51</sup> *Smith v. Sherry*, 50 Wis. 210.

<sup>52</sup> *Stiltz v. Indianapolis*, 55 Ind. 515; *Logansport v. Seybold*, 59 Ind. 225; *Giboney v. Cape Girardeau*, 58 Mo. 141; *Groff v. Frederick City*, 44 Md. 67; *Martin v. Dix*, 52 Miss. 53; *Turner v. Althaus*, 6 Neb. 54; *Kelley v.*

municipal corporations, their existence, extent, and powers, are entirely within the control of the legislature, unless restrained by other provisions of the constitution than that relating to eminent domain. The legislature may divide or consolidate them, expand or contract their limits as it sees fit. These propositions are almost elementary and substantially undisputed. For the courts to say what lands within a municipal corporation may be taxed for municipal purposes, and what not, is clearly judicial legislation and involves insuperable difficulties. These are well pointed out by the Supreme Court of Nebraska in *Turner v. Althaus*,<sup>53</sup> from which we quote as follows: "The rule contended for is, that the theory of compensation to the owner of property within the corporate limits of a city by way of protection or benefit, derived from the city government, applies to property used and occupied for city purposes, and is co-extensive, only, with that line or point where it ceases to operate beneficially to the proprietor in a municipal point of view. Who is the arbiter to define this line—and where is it to be exactly found? If the judiciary is to act as such arbiter, then it seems clear that it must do one of two things, either to pronounce the act unconstitutional—(as in *Smith v. Sherry*, 50 Wis. 210) and upon such decision, as already shown, the tax district will be destroyed—or it must, by legislative action, amend and change the law, and classify the property within the city limits, so as to subject part thereof to taxation, and exempt the other part from taxation, and this must be done by piecemeal as each case shall arise. But in the adjudication of cases which must constantly arise under the rule contended for, it seems impossible to discover any test, or criterion, by which uniformity and certainty of decisions may be obtained. The opinions of men are so diversified and varied, that what to one mind may seem clearly right and proper, to another may clearly appear to be wrong and unjust. By one court lands may be adjudged subject to

Pittsburgh, 85 Pa. St. 170; Appeal of Hewitt, 88 Pa. St. 55; Norris v. City of Waco, 57 Tex.

635; Forsythe v. City of Hammond, 68 Fed. Rep. 774.

<sup>53</sup> 6 Neb. 54, 74.

taxation, and by another the same lands, or lands similarly situated, may be adjudged exempt from taxation. Which would be right? Who can decide the question? It therefore seems difficult to escape the conclusion that the decision of each case, as it shall arise, must depend upon the caprice of the arbiter who determines it, for he cannot resolve the question upon any principle of legal science. Hence the exercise of judicial power in apportioning the taxes of a district affords no security against the abuse of the taxing power; but on the contrary, it may be fraught with more danger, and result in greater injustice, than a uniform system of taxation established by legislative enactment."

An act providing for fencing a large tract of land and levying a tax to build and maintain the fences, was held void as being for a private purpose and as a taking of private property, without compensation.<sup>54</sup>

§ 156. Taking under the guise of the police power. Regulating the use of property, the construction, repair and height of buildings and the like. Fire limits.—While the theoretical distinction between the police power and the power of eminent domain is clear and definite, it is not always easy to distinguish them in their practical application. That is sometimes attempted under the police power which can only be accomplished by an exercise of eminent domain. We shall not go at length into this question, but advert briefly to some of the cases in which the question has been made. Fire limits may be established and the manner of building regulated with a view to preventing the spread of fires.<sup>55</sup> The erection or repairing of wooden buildings in cities may be prohibited, and such a regula-

<sup>54</sup> *Hancock Stock & Fence Law Co. v. Adams*, 87 Ky. 417, 9 S. W. Rep. 246; *Fort v. Goodwin*, 36 S. C. 445, 15 S. E. Rep. 723. And see *Cypress Pond Dr. Co. v. Hooper*, 2 Met. (Ky.) 350.

<sup>55</sup> *Dillon Munic. Corp.* § 405; *ex parte Fisher*, 72 Cal. 125;

*Brady v. Northwestern Insurance Co.*, 11 Mich. 425; *Knoxville v. Bird*, 12 Lea, 121; *Canepa v. Birmingham*, 92 Ala. 358, 7 So. Rep. 180; *Hubbard v. Medford*, 20 Or. 315, 25 Pac. Rep. 640; *City of Olympia v. Mann*, 1 Wash. 389, 25 Pac. Rep. 337.

tion is not a taking of a partially destroyed building.<sup>56</sup> The height of buildings may be limited.<sup>57</sup> An act prohibiting the use of any building not "now" used for that purpose, for slaughtering, rendering and the like, is not unconstitutional as interfering with private property without compensation.<sup>58</sup> The use of property in certain localities for carrying on unwholesome or objectionable manufactures or business, may be prohibited.<sup>59</sup> And an act prohibiting the use of property for certain purposes or the carrying on of a business injurious to the public health or public morals, though in violation of a previous grant of the legislature, and though it may destroy and greatly impair the value of property, is neither a taking for public use under the power of eminent domain, nor a violation of a contract.<sup>60</sup> The legislature may regulate the construction and use of

<sup>56</sup> *Brady v. Northwestern Insurance Co.*, 11 Mich. 425; *Klinger v. Bickal*, 117 Pa. St. 326, 11 Atl. Rep. 555; *State v. Johnson*, 114 N. C. 846, 19 S. E. Rep. 599; *First Nat'l Bank v. Sarilla*, 129 Ind. 201, 28 N. E. Rep. 434, 5 Am. R. R. & Corp. Rep. 77.

<sup>57</sup> *People v. D'Oench*, 111 N. Y. 359, 18 N. E. Rep. 862; and see *Attorney General v. Williams (Mass.)*, 55 N. E. Rep. 77, where such a regulation is treated as an exercise of the power of eminent domain.

<sup>58</sup> *Watertown v. Mayo*, 109 Mass. 315.

<sup>59</sup> *Ex parte Lacey*, 108 Cal. 326, 41 Pac. Rep. 411; *Green v. Savannah*, 6 Ga. 1; *Waters Pierce Oil Co. v. New Iberia*, 47 La. An. 863, 17 So. Rep. 343; *City of Newark v. Watson*, 56 N. J. L. 667, 29 Atl. Rep. 487; *State v. Pendegrass*, 106 N. C. 664, 10 S. E. Rep. 1002; *City of Austin v. Austin City Cem. Ass'n*, 87

Tex. 330, 28 S. W. Rep. 523, 11 Am. R. R. & Corp. Rep. 265.

<sup>60</sup> *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634; affirmed, 97 U. S. 659; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; same case below, 4 Wood, 96; *Boyd v. Alabama*, 94 U. S. 645; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814; *Sprigg v. Park*, 89 Md. 406. In *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, three of the seven judges dissenting, it was held that the Cemetery Company, having been authorized by charter to acquire five hundred acres of land in Lake View, to be used for cemetery purposes, could not be deprived of the privileges of using a portion of the land so acquired for cemetery purposes, without compensation. See also *New Orleans Water Works Co. v. St. Tammany Water Works Co.*, 4 Wood, 134.



wharves and piers and prescribe dock lines,<sup>61</sup> but cannot declare a dock which has been rightly and properly built, a nuisance, and abate it without compensation, because it projects beyond a dock line afterwards established.<sup>62</sup> An act prohibiting the taking of sand or gravel from a sea beach was held valid as a proper regulation of the use of private property for the preservation of Boston harbor, and a person violating the act was found guilty though he owned the fee of the land whence he took the sand.<sup>63</sup> But an act prohibiting a railroad company from opening an embankment, which protected the shore from the waves and tide, was held an unlawful restriction upon the use of property.<sup>64</sup> Fishing with a net or seine may be prohibited, even in private waters.<sup>65</sup> An ordinance limiting the amount of land any person or family may cultivate within a city is not void as a taking.<sup>66</sup> Nor an ordinance imposing a penalty for permitting water to run upon a street or alley from any well or spring.<sup>67</sup> A statute prohibiting natural gas to be sent through pipes at a greater pressure than 300 pounds to the square inch was held to be a valid police regulation and not a taking.<sup>68</sup> The legislature may prohibit a use of property which violates a duty that the owner owes to his neighbor or the state, and hence may prohibit the owner of lands, delinquent for taxes, from peeling bark

<sup>61</sup> *State v. Sargent*, 45 Conn. 358; *Commonwealth v. Alger*, 7 Cush. 53; *Roosevelt v. Godard*, 52 Barb. 533.

<sup>62</sup> *Chicago v. Laffin*, 49 Ill. 172; *Yates v. Milwaukee*, 10 Wall. 497; *Ryan v. Brown*, 18 Mich. 196.

<sup>63</sup> *Commonwealth v. Tewksbury*, 11 Met. 55.

<sup>64</sup> *Koch v. Delaware etc. R. R. Co.*, 53 N. J. L. 256, 21 Atl. Rep. 284.

<sup>65</sup> *People v. Bridges*, 142 Ill. 30, 31 N. E. Rep. 115; *Commonwealth v. Follett*, 164 Mass. 477,

41 N. E. Rep. 676; *State v. Theriault*, 70 Vt. 617, 41 Atl. Rep. 1030.

<sup>66</sup> *Town of Summerville v. Pressby*, 33 S. C. 56, 11 S. E. Rep. 545, 3 Am. R. R. & Corp. Rep. 101. "This power to restrain a private injurious use of property is very different from the right of eminent domain."

<sup>67</sup> *Staggs v. City of Martinsville*, 140 Ind. 476, 39 N. E. Rep. 241.

<sup>68</sup> *Jamieson v. Ind. Nat. Gas & Oil Co.*, 128 Ind. 555, 28 N. E. Rep. 76.

or cutting timber thereon.<sup>69</sup> Where a city gave the plaintiff the exclusive right of boating and fishing on its reservoir in part consideration of lands conveyed for its water works, such use cannot be prohibited without compensation.<sup>70</sup> Private property cannot be seized and occupied as a smallpox hospital under the police power.<sup>71</sup> An act which restricts one in the use of his property in a particular manner in order that another may use his in that manner to greater advantage is void.<sup>72</sup> An act excepting certain tracts of land from the operation of a law giving the right to distrain and impound trespassing cattle, thus leaving such tracts to be trespassed upon without redress, was held to deprive the owners of such tracts of their property without due process of law.<sup>73</sup> Pursuant to a grant from a city, a railroad company laid down side tracks in a street and used them for seventeen years for loading and unloading cars. The city then passed an ordinance forbidding such use of the streets. It was held that the grant was a franchise and irrevocable; that the effect of the ordinance was to destroy it, and that its enforcement should be enjoined.<sup>74</sup> An act compelling railroad companies to permit the erection and operation of elevators on their right of way at a nominal rental, was held void, as a taking without compensation.<sup>75</sup> A law making it a misdemeanor to build or maintain a fence extending more than three miles in the same general direction, without providing a gateway of a specified kind,

<sup>69</sup> *Prentice v. Weston*, 111 N. Y. 460, 18 N. E. Rep. 720.

<sup>70</sup> *Dunham v. New Britain*, 55 Conn. 378. See *Proprietors of Mills v. Commonwealth*, 164 Mass. 227, 41 N. E. Rep. 280.

<sup>71</sup> *Markham v. Brown*, 37 Ga. 277.

<sup>72</sup> *Commonwealth v. Bacon*, 13 Bush (Ky.), 210. The act prohibited any one within three hundred yards of a fair ground

from furnishing feed and shelter for horses.

<sup>73</sup> *Smith v. Bivens*, 56 Fed. Rep. 352.

<sup>74</sup> *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115.

<sup>75</sup> *Missouri Pac. R. R. Co. v. Nebraska*, 164 U. S. 403, 17 S. C. Rep. 130, reversing S. C. 29 Neb. 550; *Chicago etc. R. R. Co. v. State*, 50 Neb. 399; *State v. Chicago etc. R. R. Co.*, 36 Minn. 402.

was held to violate the eminent domain provision of the constitution.<sup>76</sup>

§ 156a. Legislative regulation and control of railroads and other corporations. Imposing new liabilities. —Corporations may be made liable for consequential damages to property by works or improvements thereafter constructed, though they had previously been exempt from such liability.<sup>77</sup> Railroad companies may be made liable for wrongfully causing the death of persons.<sup>78</sup> They may be made absolutely liable for fires communicated by their locomotives,<sup>79</sup> and may be compelled to fence their tracks, construct cattle guards, etc., and made liable for all injuries to stock resulting from a failure to comply with such regulations.<sup>80</sup> Statutes imposing a liability in such cases of double the value of the stock killed,<sup>81</sup> or making the company liable for attorney's fees in suits brought for such injuries, have been sustained.<sup>82</sup> But a statute making railroad companies absolutely liable for stock killed or injured, irrespective of negligence, is void, as depriving them

<sup>76</sup> *Dilworth v. State* (Tex. Civ. App.), 36 S. W. 274.

<sup>77</sup> *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75, 10 S. C. Rep. 34.

<sup>78</sup> *Boston etc. R. R. Co. v. State*, 32 N. H. 215; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356; *Coosa Riv. Steamboat Co. v. Barclay*, 30 Ala. 130; *Brown v. Buffalo etc. R. R. Co.*, 22 N. Y. 191; *Commonwealth v. Boston etc. R. R. Co.*, 134 Mass. 211.

<sup>79</sup> *McCandless v. Richmond & D. R. R. Co.*, 38 S. C. 103, 18 S. E. Rep. 429, 7 Am. R. R. & Corp. Rep. 366; *Lipfeld v. Charlotte etc. R. R. Co.*, 41 S. C. 285, 19 S. E. Rep. 497; *Regan v. New York etc. R. R. Co.*, 60 Conn. 124, 22 Atl. Rep. 503; *Martin v. New*

*York etc. R. R. Co.*, 62 N. Y. 331, 25 Atl. Rep. 239.

<sup>80</sup> *Minneapolis etc. R. R. Co. v. Emmons*, 149 U. S. 364, 13 S. C. Rep. 870, 7 Am. R. R. & Corp. Rep. 755, S. C. 40 Minn. 133, 42 N. W. Rep. 789; *Nelson v. Minneapolis etc. R. R. Co.*, 40 Minn. 131, 42 N. W. Rep. 788.

<sup>81</sup> *Little Rock etc. R. R. Co. v. Payne*, 33 Ark. 816; *Cairo etc. R. R. Co. v. People*, 92 Ill. 97; *Treadway v. Railroad Co.*, 43 Ia. 527; *Barnett v. Railroad Co.*, 68 Mo. 56; *Cummings v. Railroad Co.*, 70 Mo. 570; *Speelman v. Railroad Co.*, 71 Mo. 434; *Humes v. Railroad Co.*, 82 Mo. 221; *Humes v. Mo. Pac. R. R. Co.*, 115 U. S. 512.

<sup>82</sup> *Railroad Co. v. Duggan*, 109

of their property without due process of law.<sup>83</sup> Requiring railroad companies to contribute toward the expense of a state railroad commission, is not a taking of their property contrary to law.<sup>84</sup> Railroad companies may be compelled to keep a flagman at crossings,<sup>85</sup> and street railroad companies to have a driver and conductor on each car,<sup>86</sup> to water their tracks,<sup>87</sup> and to so construct cars as to protect motormen from the weather.<sup>88</sup> Railroads and corporations may be subjected to many other restrictions and requirements in the conduct of their business and use of their property, without infringing their rights of property.<sup>89</sup> Municipal corporations may be made liable for property destroyed by mobs.<sup>90</sup> A statute of Massachusetts required railroad companies to sell 1,000-mile passenger tickets for

Ill. 537; *Perkins v. St. Louis etc. R. R. Co.*, 103 Mo. 54, 15 S. W. Rep. 320. And see *Cameron v. Chicago etc. R. R. Co. (Minn.)*, 65 N. W. Rep. 652.

<sup>83</sup> *Wadsworth v. Union Pac. R. R. Co.*, 18 Col. 600, 33 Pac. Rep. 515, 8 Am. R. R. & Corp. Rep. 127; *Denver etc. R. R. Co. v. Outcalt*, 2 Col. App. 395, 31 Pac. Rep. 176; *Denver etc. R. R. Co. v. Davidson*, 2 Col. App. 443, 31 Pac. Rep. 181; *Birmingham Mineral R. R. Co. v. Parsons*, 100 Ala. 662, 13 So. Rep. 602.

<sup>84</sup> *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386, 12 S. C. Rep. 255, 5 Am. R. R. & Corp. Rep. 575, S. C. 27, S. C. 385, 4 S. E. Rep. 49.

<sup>85</sup> *State v. Cozzens*, 42 La. An. 1069, 8 So. Rep. 288; *Toledo etc. R. R. Co. v. Jacksonville*, 67 Ill. 37; *Lake Shore etc. R. R. Co. v. Cincinnati*, 30 Ohio St. 604.

<sup>86</sup> *South Covington etc. R. R. Co. v. Berry*, 93 Ky. 43, 18 S. W. Rep. 1026; *Trenton Horse R. R. Co. v. City of Trenton*, 53 N.

J. L. 132, 20 Atl. Rep. 1076.

<sup>87</sup> *City etc. R. R. Co. v. Savannah*, 77 Ga. 731.

<sup>88</sup> *State v. Nelson*, 52 Ohio St. 88, 39 N. E. Rep. 22; *State v. Smith*, 58 Minn. 35, 59 N. W. Rep. 545.

<sup>89</sup> *Boston etc. R. R. Co. v. Western R. R. Co.*, 14 Gray, 253; *Lexington etc. R. R. Co. v. Fitchburg R. R. Co.*, 14 Gray, 266; *State v. New Haven etc. R. R. Co.*, 43 Conn. 351; *McCoy v. Cincinnati etc. R. R. Co.*, 13 Fed. Rep. 3; *New York v. 23d St. R. R. Co.*, 113 N. Y. 311, 21 N. E. Rep. 60; *City of Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 39 N. E. Rep. 433; *City of Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. Rep. 749; *State v. Murphy*, 130 Mo. 10, 31 S. W. Rep. 594, 12 Am. R. R. & Corp. Rep. 370.

<sup>90</sup> *Folsom v. City of New Orleans*, 28 La. An. 936; *Darlington v. New York*, 31 N. Y. 164; *Matter of Pennsylvania Hall*, 5 Pa. St. 204; *County of Allegheny*

twenty dollars and made such tickets good for passage on any railroad in the state; required each company to redeem the tickets issued by it on presentation, and to accept for passage tickets issued by other companies. It was held to be unconstitutional, among other reasons, because by compelling one company to accept the tickets issued by other companies, its property was taken for public use without any adequate provision for compensation.<sup>91</sup>

§ 156b. **Regulating or prohibiting business, occupations, contracts, and the like.**—It has been held that the right to contract and the right to labor are property,<sup>92</sup> and, in this view, the right to carry on any kind of business or engage in any occupation, is property. Many laws prohibiting or restricting the right to contract, or labor, or carry on business, have been held void, because they deprived the citizen of his property without due process of law. But whatever deprives a citizen of his property without due process of law necessarily takes his property, either for public or private use, without compensation, and such laws are, therefore, also obnoxious to the eminent domain provision of the constitution. Under the police power such prohibitions and restrictions may be placed upon the right to contract and to labor, as the public welfare demands. Thus the manufacture and sale of intoxicating liquors may be prohibited altogether, though the result of such prohibition may be to render buildings, machinery and fixtures used for that pur-

v. Gibson, 90 Pa. St. 397; Louisiana v. New Orleans, 109 U. S. 285.

<sup>91</sup> Attorney General v. Boston & A. R. R. Co., 160 Mass. 62, 35 N. E. Rep. 252, 9 Am. R. R. & Corp. Rep. 569.

<sup>92</sup> "Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property-owner. \* \*

\* The right to acquire, possess

and protect property includes the right to make reasonable contracts, and when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution." Ritchie v. People, 155 Ill. 98, 40 N. E. Rep. 454. And see Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. Rep. 62; State v. Goodwill, 33 W. Va. 179, 10 S. E. Rep. 285.

pose, of little or no value.<sup>93</sup> So the manufacture and sale of oleomargarine and other imitations of butter may be prohibited, and the effect of such a statute is not to take property without compensation within the eminent domain

<sup>93</sup> *People v. Hawley*, 3 Mich. 330, 342. In this case the court say: "In the exercise of its police power a State has full power to prohibit, under penalties, the exercise of any trade or employment which is found to be hazardous or injurious to its citizens and destructive of the best interests of society, without providing compensation to those upon whom the prohibition operates." *Mugler v. Kansas*, 123 U. S. 623. The latter is the decision sustaining the prohibitory amendment to the constitution of Kansas and the legislation passed to carry it into effect. The nature of the decision is so well known that no extended comment upon it is necessary. We quote the following extract from the opinion as particularly in point in this connection: "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control

or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person

limitation.<sup>94</sup> A law prohibiting any but corporations to carry on a banking business,<sup>95</sup> or an insurance business,<sup>96</sup> has been sustained. An ordinance of the city of New Orleans requiring vendors of milk to furnish gratuitously, on application of sanitary inspectors, samples of milk, not exceeding one-half pint, for inspection and analysis, was held not to take property for public use without compensation.<sup>97</sup> On the other hand laws prohibiting the payment of wages in orders, scrip or evidences of indebtedness, not redeemable in lawful

of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Beer Co. v. Massachusetts*, 97 U. S. 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance

by any incidental inconvenience which individuals or corporations may suffer,'" pp. 668-671. See also *Kidd v. Pearson*, 128 U. S. 1, 9 S. C. Rep. 6; *Foster v. Kansas*, 112 U. S. 201, 206; *People v. McGann*, 34 Hun 358; *Ingram v. State*, 39 Ala. 247; *Dorman v. State*, 24 Ala. 216; *State v. City Council of Aiken*, 42 S. C. 222, 20 S. E. Rep. 221, overruling *McCullough v. State*, 41 S. C. 220, 19 S. E. Rep. 458.

<sup>94</sup> *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. C. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 15 S. C. Rep. 154. But see *People v. Marx*, 99 N. Y. 376.

<sup>95</sup> *State ex rel Goodsell v. Woodmanse*, 1 N. D. 246, 46 N. W. Rep. 970. But the contrary is held in *State v. Scougal*, 3 S. D. 55, 51 N. W. Rep. 858, 6 Am. R. R. & Corp. Rep. 165.

<sup>96</sup> *Commonwealth v. Vrooman*, 164 Pa. St. 306, 30 Atl. Rep. 217, 10 Am. R. R. & Corp. Rep. 519.

<sup>97</sup> *State v. Dupaquier*, 46 La. An. 577, 15 So. Rep. 502. An ordinance of same city prohibiting the sale of lottery tickets held valid. *State v. Dobard*, 45 La. An. 1412, 14 So. Rep. 253.

money,<sup>98</sup> or the employment of females in any factory or workshop for more than eight hours in any one day,<sup>99</sup> or prohibiting the manufacture of cigars in tenement houses,<sup>1</sup> or forbidding the offering of gifts as an inducement to make purchases,<sup>2</sup> and many similar laws have been held invalid, as an unconstitutional interference with the liberty and property rights of the citizen.

§ 156c. **Regulating rates and charges.**—The existence of a right or power in the state to regulate or fix the charges which may be lawfully demanded for certain services or commodities, is evidenced by an almost immemorial exercise of such right in England and America and is established in this country by a long line of decisions by the Supreme Court of the United States, beginning with *Munn v. Illinois*,<sup>3</sup>

<sup>98</sup> *Ramsey v. People*, 142 Ill. 380, 32 N. E. Rep. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. Rep. 62; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. Rep. 354; *State v. Fire Creek C. & C. Co.*, 33 W. Va. 118, 10 S. E. Rep. 283; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. Rep. 285; *State v. Loomis*, 115 Mo. 307, 22 S. W. Rep. 350; *Leep v. St. Louis etc. R. R. Co.*,—Ark.—, 25 S. W. Rep. 76, 9 Am. R. R. & Corp. Rep. 185.

<sup>99</sup> *Ritchie v. People*, 155 Ill. 98, 40 N. E. Rep. 454.

<sup>1</sup> *In re Jacobs*, 98 N. Y. 98.

<sup>2</sup> *People v. Gillson*, 109 N. Y. 389, 17 N. E. Rep. 343. The court says: "Under an exercise of the police power the enactment must have reference to the comfort, the safety or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it

is manifest such is not the object and purpose of the regulation. (See *Austin v. Murray*, 16 Pick. 121; *Com. v. Alger*, 7 Cush. 53, 84, cited with approval in *Matter of Jacobs*, 98 N. Y. 98.) As is also said in the last case, it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public health and safety, and if measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But these measures must have some relations to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above mentioned; unless such relation exist the enactment cannot be upheld as an exercise of the police power."

<sup>3</sup> 94 U. S. 113.



in 1876, and coming down to the present time. The right to exercise this power in the case of common carriers,<sup>4</sup> telegraph and telephone companies,<sup>5</sup> water, gas and light companies,<sup>6</sup> hackmen, draymen, turnpikes, bridges, ferries,<sup>7</sup> public millers and all persons or corporations exercising any franchise or privilege emanating from the government, may be regarded as settled beyond question. The right to

<sup>4</sup> *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago etc. R. R. Co.*, 94 U. S. 164; *Chicago etc. R. R. Co. v. Ackley*, 94 U. S. 179; *Ruggles v. Illinois*, 108 U. S. 526; *Stone v. Farmers L. & T. Co.*, 116 U. S. 307; *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347; *Stone v. New Orleans etc. R. R. Co.*, 116 U. S. 352; *Wabash etc. R. R. Co. v. Illinois*, 118 U. S. 557; *Dow v. Beldelman*, 125 U. S. 680; *Georgia R. & B. Co. v. Smith*, 128 U. S. 174; *Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 418, 10 S. C. Rep. 462, 702, 2 Am. R. R. & Corp. Rep. 564; *Minneapolis Eastern R. R. Co. v. Minnesota*, 134 U. S. 467, 10 S. C. Rep. 473; *Chicago & G. T. R. R. Co. v. Wellman*, 143 U. S. 339, 12 S. C. Rep. 408, 5 Am. R. R. & Corp. Rep. 638; *St. Louis etc. R. R. Co. v. Gill*, 156 U. S. 649, 15 S. C. Rep. 484, 11 Am. R. R. & Corp. Rep. 709; *Norfolk & W. R. R. Co. v. Pendleton*, 156 U. S. 667, 15 S. C. Rep. 413; *Railroad Commissioners v. Pensacola & A. R. R. Co.*, 24 Fla. 417; *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 617, 11 So. Rep. 226; *Chicago B. & Q. R. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. Rep. 247, 10 Am. R. R. & Corp. Rep. 234; *Board of R. R. Comrs. v. Symms Grocer Co.*, 53 Kan. 207, 35 Pac. Rep.

217, 9 Am. R. R. & Corp. Rep. 676; *Wellman v. Chicago & G. T. R. R. Co.*, 83 Mich. 592, 3 Am. R. R. & Corp. Rep. 703; *Norfolk & W. R. R. Co. v. Pendleton*, 83 Va. 350, 13 S. E. Rep. 709.

<sup>5</sup> *Central Union Tel. Co. v. State*, 118 Ind. 194; *Central Union Tel. Co. v. State*, 123 Ind. 113, 24 N. E. Rep. 215, 2 Am. R. R. & Corp. Rep. 406; *Hockett v. State*, 105 Ind. 250; *Chesapeake etc. Tel. Co. v. B. & O. Tel. Co.*, 66 Md. 399.

<sup>6</sup> *Spring Valley W. W. Co. v. City and County of San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1 Am. R. R. & Corp. Rep. 96; *Spring Valley W. W. v. Schottler*, 110 U. S. 347; *City of Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575, 28 N. E. Rep. 853; *Westfield Gas & M. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. Rep. 1033; *In re Pryor*, 53 Kan. 724, 41 Pac. Rep. 958; *State v. Laclede Gas & L. Co.*, 102 Mo. 472, 14 S. W. Rep. 974.

<sup>7</sup> *Covington & L. Turnpike R. R. Co. v. Sandford (Ky.)*, 20 S. W. Rep. 1031; *Commonwealth v. Covington & Cinn. Bridge Co. (Ky.)*, 21 S. W. Rep. 1042, 7 Am. R. R. & Corp. Rep. 638; *S. C. on appeal*, 154 U. S. 204, 14 S. C. Rep. 1087, 10 Am. R. R. & Corp. Rep. 399.

regulate the charges of grain elevators is also well settled, although those engaged in the business do not hold any franchise or privilege from the state.<sup>8</sup> The general rule has been laid down that whenever a property or business is "affected with a public interest" or "devoted to a public use," it is subject to public regulation.<sup>9</sup> The right to regulate rates and charges may be precluded by contract, either in the form of charter provision or otherwise,<sup>10</sup> and the states cannot regulate the charges for interstate commerce.<sup>11</sup> It was formerly understood that the power of the legislature to fix rates and charges was absolute,<sup>12</sup> but that idea is now exploded. If such was the case, it is manifest that it would be within the power of the legislature to greatly impair or even destroy the value of property by fixing rates that were unreasonably low. To fix rates which are unreasonably low for any property or business, affected with a public interest, is to take property for public use without compensation, as well as to deprive of property without due process of law.<sup>13</sup> The power, therefore, is

<sup>8</sup> *Munn v. Illinois*, 94 U. S. 113, S. C. 69 Ill. 80; *Budd v. New York*, 143 U. S. 517, 12 S. C. Rep. 468, 5 Am. R. R. & Corp. Rep. 610; S. C. 117 N. Y. 1; *Brass v. North Dakota*, 153 U. S. 391, 14 S. C. Rep. 857, 10 Am. R. R. & Corp. Rep. 380.

<sup>9</sup> *Munn v. Illinois*, 94 U. S. 113. And see *Cooley Const. Lim.* p. 739; *Tiedeman on Police Power*, p. 233; *People v. Budd*, 117 N. Y. 1, 27-29.

<sup>10</sup> *Stone v. Farmer L. & T. Co.*, 116 U. S. 307; *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347; *Ruggles v. Illinois*, 108 U. S. 526; *Georgia R. & B. Co. v. Smith*, 128 U. S. 174; *Dow v. Bridleman*, 125 U. S. 680; *Norfolk & W. R. R. Co. v. Pendleton*, 156 U. S. 667, 15 S. C. Rep. 413; *In re Pryor*, 55 Kan. 724, 41 Pac. Rep. 958; *State*

*v. Laclede Gas Co.*, 102 Mo. 472, 14 S. W. Rep. 974.

<sup>11</sup> *Wabash etc. R. R. Co. v. Illinois*, 118 U. S. 577; *Covington & Cinn. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 S. C. Rep. 1087, 10 Am. R. R. & Corp. Rep. 399; *Gulf etc. R. R. Co. v. Heffiry*, 158 U. S. 98, 15 S. C. Rep. 802.

<sup>12</sup> *Munn v. Illinois*, 94 U. S. 113; *Wellman v. Chicago & G. T. R. R. Co.*, 83 Mich. 592, 3 Am. R. R. & Corp. Rep. 703; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. Rep. 247, 10 Am. R. R. & Corp. Rep. 234; *Covington etc. T. Co. v. Sandford (Ky.)*, 20 S. W. Rep. 1031.

<sup>13</sup> *Pensacola & A. R. R. Co. v. State*, 25 Fla. 310; *Commonwealth v. Covington & Cinn. Bridge Co. (Ky.)*, 21 S. W. Rep. 1042, 7 Am. R. R. & Corp. Rep.

limited to the fixing of reasonable rates and the reasonableness of rates established may be inquired into by the courts.<sup>14</sup>

§ 156d. Taking, injuring or destroying property in the abatement of nuisances, or when made, kept, or used in violation of law.—“To destroy property because it is a public nuisance is not to appropriate it to public use, but to prevent any use of it by the owner, and to put an end to its existence, because it could not be used consistently with the maxim, *sic utere tuo ut alienum non laedas*.”<sup>15</sup> Any nuisance may be abated, such as a pig sty,<sup>16</sup> a stagnant pool,<sup>17</sup> or a mill pond which has become befouled by sewerage,<sup>18</sup> without compensation for the property de-

638; *St. Louis etc. R. R. Co. v. Gill*, 156 U. S. 649, 15 S. C. Rep. 484, 11 Am. R. R. & Corp. Rep. 709; *Covington etc. Road Co. v. Sandford*, 164 U. S. 578, 17 S. C. Rep. 198; *Smythe v. Ames*, 169 U. S. 466; *San Diego Water Co. v. San Diego*, 118 Cal. 556.

<sup>14</sup> *Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 418, 10 S. C. Rep. 462, 702, 2 Am. R. R. & Corp. Rep. 564; *Minneapolis Eastern R. R. Co. v. Minnesota*, 134 U. S. 467, 10 S. C. Rep. 473; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 S. C. Rep. 1047, 9 Am. R. R. & Corp. Rep. 641; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 S. C. Rep. 1060; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 14 S. C. Rep. 1062; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 420, 14 S. C. Rep. 1062; *St. Louis etc. R. R. Co. v. Gill*, 156 U. S. 649, 15 S. C. Rep. 484, 11 Am. R. R. & Corp. Rep. 709; *Mercantile Trust Co. v. Texas & P. R. R. Co.*, 51 Fed. Rep. 529; *Ames v. Union Pac. R. R. Co.*, 64 Fed. Rep. 165; *Missouri Pac. R.*

*R. Co. v. Smith*, 60 Ark. 221, 29 S. W. Rep. 752; *State v. Sioux City etc. R. R. Co.*, 46 Neb. 682, 65 N. W. Rep. 766.

<sup>15</sup> *Dunbar v. City Council of Augusta*, 90 Ga. 390, 17 S. E. Rep. 907.

<sup>16</sup> *St. Louis v. Stern*, 3 Mo. App. 48.

<sup>17</sup> *Baker v. Boston*, 12 Pick. 184.

<sup>18</sup> *New Castle City v. Raney*, 6 Pa. Co. Ct. 87; *Americus v. Mitchell*, 79 Ga. 807; *People v. Board of Health*, 140 N. Y. 1, 35 N. E. Rep. 320. But under authority to abate nuisances a city cannot fill up a slip which has become foul by reason of its own failure to prevent the casting of filth and refuse therein, and when it can be cleaned out at small expense. *Babcock v. Buffalo*, 56 N. Y. 268. And when the statute points out the manner of abatement, it must be strictly pursued or a liability will be incurred. *Frank v. Atlanta*, 72 Ga. 428.

stroyed or interfered with.<sup>19</sup> Low, wet grounds in populous localities may be filled up at the expense of the owners for the purpose of preserving the public health.<sup>20</sup> But land upon which there is no nuisance belonging to one proprietor cannot be occupied with drains or other works for the purpose of abating a nuisance on the lands of others, unless compensation is made.<sup>21</sup> Intoxicating liquors kept or made in violation of law may be destroyed.<sup>22</sup> Bread made under weight in violation of law may be forfeited;<sup>23</sup> cattle taken damage feasant may be impounded and sold after reasonable notice.<sup>24</sup> So a building which is in such condition as to endanger life and property may be declared a nuisance and destroyed without compensation.<sup>25</sup> Likewise a building erected in violation of a valid fire ordinance.<sup>26</sup> Damaged grain, <sup>27</sup> milk kept for sale and below

<sup>19</sup> See generally Attorney General v. Hunter, 1 Dev. Eq. 12; Eason v. Perkins, 2 Dev. Eq. 38; Denver v. Mullen, 7 Col. 345. But only the nuisance can be abated. Railroad tracks cannot be torn up because they are used in a way to create a nuisance. Chicago v. Union Stock Yards etc. Co., 164 Ill. 224, 45 N. E. Rep. 430.

<sup>20</sup> Farnsworth v. Boston, 126 Mass. 1; Bancroft v. Cambridge, 126 Mass. 438; Welch v. Boston, 126 Mass. 442; City of Charleston v. Werner, 38 S. C. 488, 17 S. E. Rep. 33, 8 Am. R. R. & Corp. Rep. 73; Bush v. Dubuque, 69 Ia. 233; Sweet v. Rechel, 37 Fed. Rep. 323; Leavitt v. City of Cambridge, 120 Mass. 157; Charleston v. Werner (S. C.), 24 S. E. 207.

<sup>21</sup> Matter of Chessbrough, 78 N. Y. 232; S. C. 17 Hun 561; Cavanaugh v. Boston, 139 Mass. 426.

<sup>22</sup> Beer Co. v. Massachusetts, 97 U. S. 25; State v. Snow, 3 R. I. 64; ex parte Keeler, 45 S. C.

537, 23 S. E. Rep. 865. But see Wynehamer v. People, 13 N. Y. 378; Scott v. Donald, 165 U. S. 58, 17 S. C. Rep. 265. On the evacuation of Richmond by the confederates the city council ordered the destruction of certain liquor and pledged the city to pay for the same. In a suit to recover its value it was held that it was taken under the police power and not under the power of eminent domain and that there could be no recovery. Wallace v. Richmond, 94 Va. 204.

<sup>23</sup> Guillotte v. New Orleans, 12 La. An. 432; In re Nasmith, 2 Ontario 192.

<sup>24</sup> Dillard v. Webb, 55 Ala. 468.

<sup>25</sup> Harvey v. Dewoody, 18 Ark. 252; Thellan v. Porter, 14 Lea, 622; Raymond v. Fish, 51 Conn. 80.

<sup>26</sup> Hine v. New Haven, 40 Conn. 478; King v. Davenport, 93 Ill. 305; City of Brooklyn v. Franz, 87 Hun 54, 33 N. Y. Supp.

the standard prescribed by law,<sup>28</sup> and fish nets used in violation of law,<sup>29</sup> may be summarily destroyed and such destruction is not a taking for public use, requiring compensation to be made.<sup>30</sup>

§ 156e. Compelling railroads and others to make alterations and construct works for the purpose of promoting the public safety, convenience and welfare.—Where the charter of a water-power company is subject to amendment, alteration or repeal at the pleasure of the legislature, it may be compelled to construct a fishway in its dam without compensation,<sup>31</sup> otherwise not.<sup>32</sup> A railroad company may be compelled to erect such structures and submit to such regulations as are necessary for the safety of the public or security of property, and accordingly may be required to disuse steam upon city streets,<sup>33</sup> construct and maintain cattle-guards and fences,<sup>34</sup> widen and repair bridges over its

869. As to destroying obstructions in streets as nuisances, see *State v. Jersey City*, 34 N. J. L. 31; *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. Rep. 85; *Gas Light Co. v. Hart*, 40 La. An. 474, 4 So. Rep. 215.

<sup>27</sup> *Dunbar v. City Council of Augusta*, 90 Ga. 390, 17 S. E. Rep. 907.

<sup>28</sup> *Deems v. Baltimore*, 80 Md. 164, 30 Atl. Rep. 648.

<sup>29</sup> *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. Rep. 878; *S. C.* affirmed, 152 U. S. 133. The nature and limits of the police power are much discussed in this case. *Bittenhaus v. Johnston*, 92 Wis. 477, 66 N. W. Rep. 805. Compare *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. Rep. 302.

<sup>30</sup> As to killing of animals by officers of humane society, see *King v. Hayes*, 80 Me. 206, 13 Atl. Rep. 882; *Sahr v. Scholle*, 89 Hun 42, 35 N. Y. Supp. 97;

*Munn v. Corbin* (Col. App.), 44 Pac. Rep. 783.

<sup>31</sup> *Commissioners of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446; *Holyoke Co. v. Lyman*, 15 Wall. 500; see also *S. P. Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254.

<sup>32</sup> *Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. St. 41; *State v. Glen*, 7 Jones, L. 321; *Cornelius v. Glen*, *ibid.* 512; *People v. Platt*, 17 Johns. 195; *Woolver v. Stewart*, 36 Ohio St. 146; contra: *Parker v. People*, 111 Ill. 581; *West Point W. P. & L. I. Co. v. State* (Neb.), 66 N. W. Rep. 6.

<sup>33</sup> *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207; *Railroad Co. v. Richmond*, 96 U. S. 521.

<sup>34</sup> *Nelson v. Vermont & Canada R. R. Co.*, 26 Vt. 717; *Thorp v. Rutland & Burlington R. R. Co.*, 27 Vt. 140; *Missouri Pacific Ry.*

road,<sup>35</sup> remove dangerous grade crossings,<sup>36</sup> construct and maintain stations at the intersections with other roads,<sup>37</sup> to maintain bulletin boards at stations, showing whether trains

Co. v. Humes, 115 U. S. 512; Emons v. Minneapolis & St. Louis Ry. Co., 35 Minn. 503; Minneapolis & St. L. R. R. Co. v. Emons, 149 U. S. 364, 13 S. C. Rep. 870, 7 Am. R. R. & Corp. Rep. 755; Birmingham Mineral R. R. Co. v. Parsons, 100 Ala. 662, 13 So. Rep. 602; Kansas City etc. R. R. Co. v. Spencer, 72 Miss. 491, 17 So. Rep. 168; Ohio etc. R. R. Co. v. Russell, 115 Ill. 52.

<sup>35</sup> English v. New Haven & Northampton Co., 32 Conn. 240; Chicago etc. R. R. Co. v. Nebraska, 170 U. S. 57. But see Kansas City v. Kansas City Belt R. R. Co., 102 Mo. 633, 14 S. W. Rep. 808, 3 Am. R. R. & Corp. Rep. 522. So where a railroad crosses a street it may be compelled to change its grade to conform to a change in the grade of the street. Cleveland v. Augusta, 102 Ga. 233; also to reconstruct on a different plan a bridge by which it crosses a street, so as to remove obstructions from the street. Delaware etc. R. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. Rep. 44; Delaware etc. R. R. Co. v. Buffalo, 158 N. Y. 478, 53 N. E. Rep. 533.

<sup>36</sup> New York & N. E. R. R. Co. v. Town of Bristol, 151 U. S. 556, 9 Am. R. R. & Corp. Rep. 593; People v. Union Pac. R. R. Co., 20 Col. 186, 37 Pac. Rep. 610; In re Selectmen of Norwood, 161 Mass. 259, 37 N. E. Rep. 199; State v. City of Camden, 53 N. J. L. 322, 21 Atl. Rep. 565; City of

Argentine v. Atchison etc. R. R. Co., 55 Kans. 730, 41 Pac. Rep. 946; Woodruff v. Catlin, 54 Conn. 277; Woodruff v. New York etc. R. R. Co., 59 Conn. 63, 20 Atl. Rep. 17; Doolittle v. Selectmen of Brandford, 59 Conn. 402, 22 Atl. Rep. 336; Town of Suffield v. Northampton Co., 53 Conn. 367; Railroad Co. v. Waterbury, 55 Conn. 19; Town of Westbrook's Appeal, 57 Conn. 96, 17 Atl. Rep. 368; Town of Fairfield's Appeal, 57 Conn. 167, 17 Atl. Rep. 764; New York etc. R. R. Co.'s Appeal, 58 Conn. 532, 20 Atl. Rep. 670; New York etc. R. R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. Rep. 439; New York & N. E. R. R. Co. v. Town of Bristol, 62 Conn. 527, 26 Atl. Rep. 122; Cullen v. New York etc. R. R. Co., 66 Conn. 211, 33 Atl. Rep. 910; Veazie v. Mayo, 45 Me. 560; State v. Noyes, 47 Me. 189; In re Old Colony R. R. Co., 163 Mass. 356, 40 N. E. Rep. 198; State v. Minneapolis etc. R. R. Co., 39 Minn. 219, 39 N. W. Rep. 153; State v. St. Paul etc. R. R. Co., 38 Minn. 246; State v. St. Paul etc. R. R. Co., 35 Minn. 131; Mooney v. Clark, 69 Conn. 241; Chicago etc. R. R. Co. v. State, 47 Neb. 550, 66 N. W. Rep. 624.

<sup>37</sup> State v. Wabash etc. R. R. Co., 83 Mo. 144; San Antonio etc. R. R. Co. v. State, 79 Tex. 264, 14 S. W. Rep. 1063; State v. Kansas City etc. R. R. Co., 32 Fed. Rep. 722.

are on time or not,<sup>38</sup> to provide separate and equal accommodations for the white and colored races,<sup>39</sup> and in these and like cases there is simply an exercise of the police power and not a taking of property for public use under the power of eminent domain. Owners of electric wires in streets of cities may be compelled to put them underground,<sup>40</sup> and owners of tenement houses may be required to provide a supply of water on each floor.<sup>40a</sup> Some cases hold that a railroad company cannot be compelled to construct a highway across its track, even though the power to modify or repeal its charter is reserved.<sup>41</sup> Other cases hold that it may be done when the power to repeal, alter or amend the charter is reserved.<sup>42</sup> A recent case in Maine sustained, as a valid police regulation, a statute which made it the duty of a railroad company, when a new highway was laid out over its tracks, to construct and maintain the crossing.<sup>43</sup>

<sup>38</sup> *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. Rep. 937, 12 Am. R. R. & Corp. Rep. 581; *State v. Indiana etc. R. R. Co.*, 133 Ind. 69, 32 N. E. Rep. 817; *State v. Pennsylvania Co.*, 133 Ind. 700, 32 N. E. Rep. 822.

<sup>39</sup> *Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587, 1 Am. R. R. & Corp. Rep. 724; *Ex parte Plessy*, (La. An.) 11 So. Rep. 948, 7 Am. R. R. & Corp. Rep. 383.

<sup>40</sup> *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. Rep. 919, 4 Am. R. R. & Corp. Rep. 199; *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552.

<sup>40a</sup> *Health Department v. Trinity Church*, 145 N. Y. 32, 39 N. E. Rep. 833.

<sup>41</sup> *Miller v. New York & Erie R. R. Co.*, 21 Barb. 513; *Illinois Central R. R. Co. v. Bloomington*, 76 Ills. 447; *People v. Lake Shore & Mich. Southern Ry. Co.*, 52 Mich. 277.

<sup>42</sup> *Albany Northern Ry. Co. v.*

*Brownell*, 24 N. Y. 345; *Boston & Albany R. R. Co. v. Greenbush*, 52 N. Y. 510; *Portland & Rochester R. R. Co. v. Deering*, 78 Me. 61.

<sup>43</sup> The court say: "Corporations derive their existence from the State, and hence are subject to the State even more completely than individuals. Corporations created for public purposes and invested with large powers, as railroad corporations are, can properly be required to do any reasonable thing and to assume permanently any reasonable duty, which shall promise greater security from the dangers attendant upon the exercise of their powers. There must needs be a highway. The crossing at the railroad must be kept in repair. To permit any divided authority or responsibility as to the crossing would be dangerous. The railroad company would loudly remonstrate if the munic-

But a corporation cannot be deprived of its essential rights without compensation. Thus, a bridge company cannot be compelled to construct a draw,<sup>44</sup> or a turnpike company to remove or open its gates.<sup>45</sup> A statute providing that, where a railroad was laid adjacent to or upon a highway, unobstructed residence crossings should be provided and maintained by the railroad, if so ordered by the railroad commissioners, was held to take the property of the company without compensation and to be void.<sup>46</sup>

§ 156f. Taking under the guise of the police power. Conclusions. —As a result of the decisions cited in the foregoing sections and the principles upon which they depend, we think the following conclusions may be deduced: The use of property may be regulated as the public welfare demands. A public nuisance may be abated and private property interfered with or destroyed for that purpose. The conduct of any business detrimental to the public interests may be prohibited. Property made or kept in violation of law may be destroyed. Railroad corporations, and others invested with the power of eminent domain, because their

ipality were given the power to manage the crossing. The company needs the entire control for its own protection as well as that of its passengers. By operating its road it occasions the danger. It is not unreasonable that the railroad company should provide against the danger so occasioned. Such a requirement does not seem to be an 'alteration, amendment or repeal' of the charter of the Boston and Maine Railroad Company. The company exercises all the powers and privileges it had before the enactment of the statute requiring this duty of maintaining crossings. The statute simply requires more care and greater security in such exercise. However

the statute may affect the company or its charter, we think the company is subject to it." *Railroad Co. v. County Comrs.*, 79 Me. 386, 395.

<sup>44</sup> *Washington Bridge Co. v. State*, 18 Conn. 53. To same effect: *Denver v. Denver Cable City R. R. Co.*, 22 Col. 565, 45 Pac. Rep. 439.

<sup>45</sup> *Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 396; *Powell v. Sammons*, 31 Ala. 552; and see *City of Philadelphia v. Scott*, 9 Phil. 171, 81 Pa. St. 80; *City of Schenectady v. Furman*, 145 N. Y. 482, 40 N. E. Rep. 221.

<sup>46</sup> *People v. Detroit etc. R. R. Co.*, 79 Mich. 471, 44 N. W. Rep. 934, 2 Am. R. R. & Corp. Rep. 215.



business is of public utility, may be subjected to such regulations in regard to their charges and the conduct of their business as the legislature deem wise and proper for the general good. They may be compelled to adopt such appliances and execute such additions or changes in their works or property and take such precautions as are necessary to the public safety. Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made.<sup>47</sup>

<sup>47</sup> An act prohibiting the manufacture of cigars or tobacco in a certain class of tenement houses in cities of over five hundred thousand population, of which there was only one in the State, was held invalid in *matter of Jacobs*, 98 N. Y. 98; S. C. 33 Hun 374. Ordinances compelling abutting owners to clean the snow and ice from their sidewalks and to keep them in repair were held invalid in *Illinois*. *Gridley v. Bloomington*, 88 Ill. 554; *Chicago v. O'Brien*, 111 Ill. 532; *Chicago v. Crosby*, 111 Ill. 538. But the contrary has been held in other States. In *re Goddard*, 16 Pick. 504; *Union R. R. Co. v. Cambridge*, 11 Allen 287; *Kirby v. Boylston Market Assn.* 14 Gray 252; *Village of Carthage v. Frederick*, 122 N. Y. 268, 3 Am. R. R. & Corp. Rep. 538; *City of St. Louis v. Conn. Mut. L. Ins. Co.*, — Mo. —,

18 S. W. Rep. 145; *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. Rep. 1146. In some of these cases it was contended, that the effect of such regulations was to take private property for public use without compensation. See also, as illustrating the text, *Philadelphia etc. R. R. Co. v. Philadelphia*, 47 Pa. St. 325; *Albany v. Watervliet etc. R. R. Co.*, 45 Hun 442; *Clark v. Syracuse*, 13 Barb. 32; *Philadelphia v. Scott*, 81 Pa. St. 80.

The legislature cannot bargain away its police power, at least so far as the public health and the public morals are concerned. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; and see *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683.

## CHAPTER VII.

### MEANING OF THE WORDS "PUBLIC USE."

§ 157. Taking for private use unauthorized.—Only a few of the State constitutions in terms prohibit the taking of private property for private use.<sup>1</sup> All courts, however, agree in holding that this cannot be done.<sup>2</sup> Different courts

<sup>1</sup> See provisions in the constitutions of Alabama, Colorado, Georgia, Louisiana and Missouri, ante, §§ 15, 18, 22, 28, 35.

<sup>2</sup> Bankhead v. Brown, 25 Ia. 540; Nesbitt v. Trumbo, 39 Ill. 110; Matter of Albany Street, 11 Wend. 151; Concord R. R. Co. v. Greeley, 17 N. H. 47; Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9, 59; Beckman v. Railroad Co., 3 Paige 73; Witham v. Osburn, 4 Oregon 318; Hepburn's Case, 3 Bland (Md.) 95; Hoyer v. Swan's Lessee, 5 Md. 237, 244; Dunn v. Charleston, Harper (S. C.) 189; Osborn v. Hart, 24 Wis. 89; Tyler v. Beacher, 44 Vt. 648; Dickey v. Tension, 27 Mo. 373; Clack v. White, 2 Swan 540; Sadler v. Langham, 34 Ala. 311; Taylor v. Porter, 4 Hill 140; Valley City Salt Co. v. Brown, 7 W. Va. 191; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Varner v. Martin, 21 W. Va. 534; Bangor R. R. Co. v. McComb, 60 Me. 290; Harris v. Thompson, 9 Barb. 350; McCauley's Appeal, 70 Pa. St. 210; Kenedy v. Erwin, Busbee L. 387; Embury v. Conner, 3 N. Y. 511, S. C. 2 Sandf. 89; Scudder v. Trenton Delaware Falls Co., 1

N. J. Eq. 694, 726; Robinson v. Swope, 12 Bush 21, 27; Harding v. Funk, 8 Kan. 315, 323; Jenal v. Green Island Draining Co., 12 Neb. 163; Waddell's Appeal, 84 Pa. St. 90; Brown v. Beatty, 34 Miss. 227, 240; Dayton Mining Co. v. Seawell, 11 Nev. 394, 399; Hand Gold Mining Co. v. Parker, 59 Ga. 419, 421; Lorenz v. Jacob, 63 Cal. 73; Bennett v. Boyle, 40 Barb. 551; Matter of John & Cherry Streets, 19 Wend. 659; Matter of Eureka Basin Warehouse and Manuf. Co., 96 N. Y. 42; McQuillen v. Hatton, 42 Ohio St. 202; Gillan v. Hutchinson, 16 Cal. 153; Prior v. Swartz, 62 Conn. 132, 25 Atl. Rep. 398; Board of Education v. Bakewell, 122 Ill. 339; Fleming v. Hull, 73 Ia. 598, 35 N. W. Rep. 673; Pearce's Heirs v. Patton, 7 B. Mon. 162; Cypress Pond Dr. Co. v. Hooper, 2 Met. Ky. 350; Hancock Stock & Fence Land Co. v. Adams, 87 Ky. 417, 9 S. W. Rep. 246; Bradley v. Pharr, 45 La. An. 426, 12 So. Rep. 618; Williams v. Judge of Eighteenth Judicial Dist., 45 La. An. 1295, 14 So. Rep. 57; Van Wilson v. Gutman, 79 Md. 405, 29 Atl. Rep. 608; Cary Library v. Bliss, 151

find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provision of the constitution,<sup>3</sup> some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land;<sup>4</sup> others, on the ground that it would be subversive of the fundamental principles of free government,<sup>5</sup> or contrary to the spirit of the constitution.<sup>6</sup> The conclusion is undoubt-

Mass. 364, 25 N. E. Rep. 92; *Turner v. Nye*, 154 Mass. 579, 28 N. E. Rep. 1048; *Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co.*, 72 Mich. 206, 40 N. W. Rep. 436; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. Rep. 894; *Forney v. Fremont etc. R. R. Co.*, 23 Neb. 465, 36 N. W. Rep. 806; *Welton v. Dickson*, 38 Neb. 767, 57 N. W. Rep. 555; *Chicago etc. R. R. Co. v. State*, 50 Neb. 399; *Matter of Niagara Falls & Whirlpool R. R. Co.*, 108 N. Y. 375, 15 N. E. Rep. 429; *Matter of Split Rock Cable R. R. Co.*, 128 N. Y. 408, 28 N. E. Rep. 506, S. C. 58 Hun 351, 34 N. Y. St. 169, 12 N. Y. Supp. 116; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. Rep. 358; *Pocantico W. W. Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Wormser v. Brown*, 72 Hun 93, 25 N. Y. Supp. 553; *State v. Lyle*, 100 N. C. 497, 6 S. E. Rep. 379; *Dalles Lumbering Co. v. Urquhart*, 16 Or. 67, 19 Pac. Rep. 78; *City of Wilkes-Barre v. Wyoming Historical & Geological Soc.*, 134 Pa. St. 616, 19 Atl. Rep. 809; *Fort v. Goodwin*, 36 S. C. 445, 15 S. E. Rep. 723; *Pittsburgh etc. R. R. Co. v. Benwood Iron Works*, 31 W. Va. 71, 8 S. E. Rep. 453; *Wisconsin Water Co.*

*v. Winans*, 85 Wis. 26, 54 N. W. Rep. 1003; *In re Theresa Dr. Dist.*, 90 Wis. 301, 63 N. W. Rep. 288; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. C. Rep. 173. Taking the land of one for the private use of another, was held an abuse of power by a municipal corporation, in *Pills v. Boswell*, 8 Ontario 680.

<sup>3</sup> See last note, and especially the following cases: *Bankhead v. Brown*, 25 Ia. 540; *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 54; *Matter of Albany Street*, 11 Wend. 151; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 59; *Robinson v. Swope*, 12 Bush. 21, 27; *Talbott v. Hudson*, 16 Gray 417; *Sedgwick on Const. Law*, p. 447 (2d ed.); *Welton v. Dickson*, 38 Neb. 767, 57 N. W. Rep. 559; *Dalles Lumbering Co. v. Urquhart*, 16 Or. 67, 19 Pac. Rep. 78; *State v. Lyle*, 100 N. O. 497, 6 S. E. Rep. 379.

<sup>4</sup> *Nesbitt v. Trumbo*, 39 Ill. 110; *Taylor v. Porter*, 4 Hill 140; *Embury v. Conner*, 3 N. Y. 511.

<sup>5</sup> *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 56; *Hepburn's Case*, 13 Bland (Md.) 95; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 56.

<sup>6</sup> *Matter of Peter Townsend*, 39

edly a correct one and is too well settled by authority to necessitate any inquiry into the true grounds upon which it rests. "It is conceded on all hands," says Judge Cooley, "that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit."<sup>7</sup>

N. Y. 171, 182. In *Concord v. Greeley*, 17 N. H. 47, 55, the court say: "We have no doubt that a law providing merely that the property of A should be taken from him and given to B, either with or without consideration, would be repugnant to the constitution. Not, indeed, to the letter of any particular clause contained in it, but to its spirit and design, which, throughout the whole, discountenance the idea that the property of the citizen is held by any such uncertain tenure as the arbitrary discretion of the legislature in a matter of mere private right, unconnected with any considerations of public utility. Such a law would not be so much in repugnance to the constitution as it would be to the principles which hold human society together; which, while they recognize the power of the legislature to be supreme, do not admit it to be arbitrary." See also *Wilton v. Dickson*, 38 Neb. 767, 57 N. W. Rep. 559.

<sup>7</sup> Cooley Const. Lims. (6th ed.) p. 651. "The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen and transfer it to another even for full compensation." *Forney v. Fremont etc. R. R. Co.*, 23 Neb.

465, 468, 36 N. W. Rep. 806. So also *Gillan v. Hutchinson*, 16 Cal. 153; *Board of Education v. Bakewell*, 122 Ill. 339; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. Rep. 92; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. Rep. 894. In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 63, the Chancellor says: "There is no prohibition in the constitution of this State, or in any of the State constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law, or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which the government was instituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign, that is not necessary

§ 158. **The question of public use a judicial one.**—It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one. But this determination is not final. All the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary.<sup>8</sup>

for the purposes of government. This maxim pervades all republican governments as well as monarchies; for the tyranny of a majority, or of corrupt representatives, is just as oppressive, and far more odious, than that of a monarch. This is the aim of all our constitutional restrictions. The first declaration in the bill of rights, that forms the first article of our State constitution, affirms that one of the unalienable rights of every man is that of acquiring, possessing, and protecting property; and the last declaration therein says that such enumeration of rights shall not be construed to deny others retained by the people. This shows that the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument. Again, the sixteenth declaration of the bill of rights, which declares that private property shall not be taken for public use without just compensation; and the ninth provision of the seventh section of the fourth article of the constitution, the article defining and restricting legislative power, which declares

that individuals and private corporations shall not be authorized to take private property for public use without compensation first made to the owners; both show, by inevitable implication, that it was not intended to confer on the legislature the power of taking private property for private use at all."

<sup>8</sup> *Sadler v. Langham*, 34 Ala. 311; *Matter of Deansville Cemetery Association*, 66 N. Y. 569; *Young v. Harrison*, 6 Ga. 130; *Parkham v. Justices etc.*, 9 Ga. 341; *Loughbridge v. Harris*, 42 Ga. 501; *Anderson v. Turbeville*, 6 Coldw. 150; *Stockton & Visalia R. R. Co. v. Stockton*, 41 Cal. 147; *Consolidated Channel Co. v. Central Pacific R. R. Co.*, 51 Cal. 269; *Harris v. Thompson*, 9 Barb. 350; *Bankhead v. Brown*, 25 Ia. 540; *Tyler v. Beacher*, 44 Vt. 648; *Dickey v. Tennison*, 27 Mo. 373; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Vanner v. Martin*, 21 W. Va. 534, 550; *Talbott v. Hudson*, 16 Gray 417; *Pittsburgh v. Scott*, 1 Pa. St. 309, 314; *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *County Court of St. Louis County v. Griswold*, 58 Mo. 175, 194-196;

Some dicta have been understood as announcing the doctrine that it was competent for the legislature not only to decide upon the necessity and expediency of an exercise of the power of eminent domain, but also to determine absolutely what uses are public within the meaning of the constitution. We think it more likely that these dicta have been misapprehended than that any judge ever intended to announce such a doctrine, and the dicta usually referred to do not necessitate any such construction.<sup>9</sup> While the legislature cannot make a use public by declaring it so,<sup>10</sup> yet its declaration will be respected by the courts, unless it is palpably without reasonable foundation.<sup>11</sup> And the use will be scrutinized less closely when the property is vested in the State or some public agency, than when it is vested in a private corporation.<sup>12</sup>

§ 159. State of the authorities as to the meaning of the words, "public use."—It is easily determined, as has been shown in the two preceding sections, that private property

Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 726; Dayton Mining Co. v. Seawell, 11 Nev. 394, 399; In re St. Paul & Northern Pacific Ry. Co., 34 Minn. 227; Savannah v. Hancock, 91 Mo. 54; McQuillen v. Hatton, 42 Ohio St. 202; Logan v. Stogdale, 123 Ind. 372, 24 N. E. Rep. 135; Williams v. Judge of Eighteenth Judicial District, 45 La. An. 1295, 14 So. Rep. 57; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. Rep. 608; City of Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. Rep. 933; Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559; Matter of Niagara Falls v. Whirlpool R. R. Co., 108 N. Y. 375, 15 N. E. Rep. 429; Poccantico W. Co. v. Bird, 130 N. Y. 249, 29 N. E. Rep. 246; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. Rep. 983; Martin v.

Burns, 155 N. Y. 23; Pittsburgh R. R. Co. v. Benwood Iron Works, 31 W. Va. 71, 8 S. E. Rep. 453; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. Rep. 1003; Shoemaker v. United States, 147 U. S. 282, 13 S. C. Rep. 361; New York etc. R. R. Co. v. Long, 69 Conn. 424; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205; Prieve v. Wis. S. L. & I. Co. (Wis.), 67 N. W. Rep. 918; Apex Transportation Co. v. Garbade, 32 Or. 582.

<sup>9</sup> See Sadler v. Langham, 34 Ala. 311, 326.

<sup>10</sup> Logan v. Stogdale, 123 Ind. 372, 24 N. E. Rep. 135.

<sup>11</sup> Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559; United States v. Gettysburg Electric R. R. Co., 160 U. S. 688, 16 S. C. Rep. 427.

<sup>12</sup> United States v. Gettysburg

can be taken only for public use, and that what is a public use is a question for the courts. When, however, we come to seek for the principles upon which the question of public use is to be determined, or to define the words, "public use," in the light of judicial decisions, we find ourselves utterly at sea. "No question has ever been submitted to the courts," says one authority, "upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words, 'public use,' as found in the different State constitutions regulating the right of eminent domain."<sup>13</sup> A perusal of the cases cited in this chapter will verify this statement. Courts have generally avoided, and wisely so, the enunciation of general principles or the giving of general definitions, which might prove stumbling blocks in subsequent cases or work mischief in their practical application. It is the duty of courts simply to apply the law to the case in hand. But every decision necessarily proceeds upon the basis of certain general principles, which, whether expressed or not, are capable of being discovered and applied to future cases. In a treatise of this sort, it is proper to seek out the general principles which underlie the decision of specific cases, as to what constitutes a public use, and so expound the law as to afford a guide in its application to new cases and conditions as they arise. Before proceeding to inquire as to the proper construction and meaning of the words public use, it will be well to divest the subject of certain outlying considerations which are sometimes supposed to affect the question, but in reality do not.

§ 160. **The question of public use not affected by the agency employed.** —As we shall see hereafter, it is competent for the legislature to delegate to individuals or cor-

Electric R. R. Co., 160 U. S. 688, 16 S. C. Rep. 427.

<sup>13</sup> *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 400; see also *Cooley Const. Lim.* p. \*532. In *Farnsworth v. Lime Rock R. R. Co.*, 83 Me. 440, 22 Atl. Rep. 373, it is

said: "There must be enterprises occupying such middle ground on this question, so near to the boundary line between public use and private use that it may be difficult to say on which side of the line the facts would place

porations the right to take private property for public use.<sup>14</sup> In determining whether the use in such case is public or not, it is an immaterial consideration that the control of the property is vested in private persons who are actuated solely by motives of private gain.<sup>15</sup> Railroads, canals, turnpikes and ferries are familiar instances of such appropriation, and the principle is of universal application. "The inquiry must necessarily be, what are the objects to be accomplished? not, who are the instruments for attaining them?"<sup>16</sup>

§ 161. Nor by the fact that the use or benefit is local or limited. —It is not necessary that the entire community, or any considerable portion of it, should directly participate in the benefits to be derived from the property taken.<sup>17</sup> "The public use required, need not be the use or benefit of the whole public or State, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular indi-

them. There must be instances at either extreme, and all the way between extremes."

<sup>14</sup> Post, § 242.

<sup>15</sup> *Brown v. Beatty*, 34 Miss. 227, 240; *Salt Co. v. Brown*, 7 W. Va. 191, 197; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 21, 83. *Edwards*, Senator, in the last case, says: "Does the fact that the power to construct the road is given to a company alter the nature of the grant? Surely not. It is entirely immaterial who constructs the road, or who defrays the expense of the construction. The object for which it is constructed must determine the nature of the grant, whether for public or private use," p. 21. Also *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 60; *Matter of Townsend*, 39 N. Y. 171; *Bellona Company Case*, 3 Bland, Chy. 442; *Cottrill v.*

*Myrick*, 12 Me. 222; *Pocantico W. W. Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Lancey v. King County*, 15 Wash. 645, 45 Pac. Rep. 645.

<sup>16</sup> *Willyard v. Hamilton*, 7 Ohio, pt. 2, 111.

<sup>17</sup> *Bloomfield etc. Natural Gas Light Co. v. Richardson*, 63 Barb. 437, 448; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. T. C. & D. R. R. Co.*, 2 Stew. & Por. 199; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Tide Water Mill Co.*, 18 N. J. Eq. 54; *O'Reilly v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Riche v. Bar Harbor Water Co. (Me.)* 28 Alb. L. J. 498; *Talbott v. Hudson*, 16 Gray 417, 425; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. Rep. 779; *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. Rep. 781; *Martin v. Burns*, 155 N. Y. 23.



viduals or estates."<sup>18</sup> A school-house site for a district of a dozen families is as undeniably for public use as the ground for a State-house.<sup>19</sup> The amount of benefit to be derived from a particular improvement or system of improvements is a consideration which addresses itself to the legislature, and not to the courts.

§ 162. Nor by the necessity or lack of necessity for the condemnation. —Some courts have held that, in order to uphold an exercise of the power of eminent domain, a necessity must exist for its exercise, in order to accomplish the purpose sought, and that this question of necessity is in some way an element in determining whether the taking is for public use.<sup>20</sup> Thus it is argued that a hotel or theater

<sup>18</sup> *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 68. Similar views are expressed in *Ross v. Davis*, 97 Ind. 79, and *McQuillen v. Hatton*, 42 Ohio St. 202. "The term implies 'the use of the many,' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be common and not for a particular individual." *Pocantico W. W. Co. v. Bird*, 130 N. Y. 249-259, 29 N. E. Rep. 246.

<sup>19</sup> In a case where the question was whether the taking for a district school was for a public use, the court say: "Every public use is, to some extent, local, and benefits a particular section more than others. Railroads and canals, the most extensive of our public works, do so in some degree. Burying grounds, aqueducts, mills, and many highways are as purely local as this, and no person can derive benefit from them except by becoming a resident in their vicinity. In the same way this may be for the benefit of any citizen. But the

use in the present case has a more enlarged and liberal view. It is a benefit and advantage to the whole country, that all the children should be educated, and thus, any means of educating the children in any district, benefit the whole. To accomplish this great object of educating the whole, it becomes necessary that a great number of schools should be supported to make them accessible to all; but the principle remains the same, as if all the children of the State could attend a single school; they are all but separate means to accomplish the same great and general benefit." *Williams v. School District*, 33 Vt. 271, 279; *Township Board v. Hackman*, 48 Mo. 243, 245.

<sup>20</sup> *Ryerson v. Brown*, 35 Mich. 333; *Jordan v. Woodward*, 40 Me. 317, 323; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Salt Co. v. Brown*, 7 W. Va. 191, 199; *Varner v. Martin*, 21 W. Va. 534, 556. In the last case the court say, the use "must be clearly a

is not a public use within the meaning of the constitution, because the public can be accommodated in those respects without resorting to the power of eminent domain.<sup>21</sup> Nearly all the cases, however, hold that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature.<sup>22</sup> The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government. They have nothing to do with the question of what constitutes a public use.

§ 163. The words "public use" a limitation.—Many courts seem to treat the question of *What is a public use?* as though the question was *For what purposes may the power of eminent domain be properly exercised.* This is a serious error. The power of eminent domain, as we have before shown, is the power of a sovereign State to appropriate private property to particular uses for the purpose of promoting the general welfare.<sup>23</sup> This power was originally in the people, in their sovereign capacity, and was by them delegated to the legislature in the general grant of legislative power. In the absence of any restrictions, the legislature could take private property for any purpose calculated to promote the general good. By the provision in question, the people said to the legislature, in effect, You shall not exercise this power except for public use. To give these words any effect, they must be construed as limiting the power to which they relate, that is,

needful one for the public, one which cannot be given up without obvious general loss and inconvenience;" also, that it "must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property."

<sup>21</sup> *Dayton Mining Co. v. Seawell*, 11 Nev. 394.

<sup>22</sup> *People v. Smith*, 21 N. Y. 595; *Challiss v. A. T. & S. F. Ry. Co.*, 16 Kan. 117, 126; *Buffalo & New York R. R. Co. v. Brainard*, 9 N. Y. 100, 109; *Bloomfield etc. Natural Gas Light Co. v. Richardson*, 63 Barb. 437; *Water Works Co. v. Burkhardt*, 41 Ind. 364, 370; *Anderson v. Turbeville*, 6 Coldw. 150, 160; *Cooley Const. Lim.* \*538; post, § 238.

<sup>23</sup> Ante, § 1.

as limiting the purposes for which private property may be appropriated. As the power is by its nature limited to such purposes as promote the general welfare, it is evident that the words public use, if they are to be construed as a limitation, cannot be equivalent to the general welfare or public good. They must receive a more restricted definition.

§ 164. *Statement of doctrines.*—The different views which have been taken of the words public use resolve themselves into two classes: one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage. Some of the many definitions of the words public use are here given. "The words 'public use' mean public utility, advantage or what is productive of public benefit."<sup>24</sup> "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose."<sup>25</sup> "By the public use is meant for the use of many, or where the public is interested."<sup>26</sup> "Whatever is beneficially employed for the community is of public use and a distinction cannot be tolerated."<sup>27</sup> Similar definitions, making the words equivalent to public benefit or advantage, are numerous.<sup>28</sup> On the other hand, numerous cases hold that to constitute a public use the property must be taken into the direct control of the public or of public agencies, or the public must have the right to use in some way the property appropriated.<sup>29</sup>

<sup>24</sup> *Olmstead v. Camp*, 33 Conn. 532, 221.

<sup>25</sup> *Chancellor Walworth in Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige 45, 73.

<sup>26</sup> *Seely v. Sebastian*, 4 Oregon, 25.

<sup>27</sup> *Aldridge v. T. C. & D. R. R. Co.*, 2 Stew. & Por. 199.

<sup>28</sup> *Pittsburgh v. Scott*, 1 Pa. St. 309, 314; *Hand Gold Mining Co. v. Parker*, 59 Ga. 419; *Todd v. Austin*, 34 Conn. 78; *Talbot v. Hudson*, 16 Gray 417; *Bellona Company Case*, 3 Bland, Chy. 442.

<sup>29</sup> *Varner v. Martin*, 21 W. Va. 534; *Memphis Freight Co. v.*

§ 165. Proper construction of the words "public use."—It is, of course, impossible to reconcile these different views, and the question is, which one is correct. "The meaning of the words cannot be ascertained by reading the constitution. No attempt is there made to define them. Nor is there any clause in that instrument, which, by its bearing upon them, teaches us the precise meaning which they were intended to have. We must, therefore, look elsewhere for a

Memphis, 4 Coldw. 419; West River Bridge Co. v. Dix, 6 How. 507, 546; Jenal v. Green Island Draining Co., 12 Neb. 163; Sholl v. German Coal Co., 118 Ills. 427; Matter of Eureka Basin Warehouse & Manf. Co., 96 N. Y. 42. In Varner v. Martin, 21 W. Va. 534, 552, 556, the court divided cases of appropriation into two classes, as follows: First, Where "the property condemned is under the direct control and use of the government, or public officers of the government, or what is almost the same thing in the direct use and occupation of the public at large, though under the control of private persons or corporations." Second. Where "it is in the direct use and occupation of private persons or of a corporation, and the general public has only an indirect and qualified use of the property condemned, or perhaps no use properly of any kind of the property condemned, but simply derives from its use by and for a private person or corporation, some indirect advantage, as by the promotion of the general prosperity of the community." As to cases of the first class, the court concludes there is no question as to the public

use. In regard to the second class, the court proceeds as follows: "I think we can show from the decisions, that a person or corporation claiming to belong to this second class, and to have legislative authority to condemn lands, must first show that he or they are possessed of each and all of these three qualifications: First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property. If any one of these essentials is wanting, the courts

true construction."<sup>30</sup> If we look to our dictionaries, we find the same confusion as in the decisions. Thus, "use" is defined as, first, "the act of employing anything or the state of being employed for any purpose; application, employment, service;" second, "the quality that makes a thing proper for a purpose; benefit, utility, advantage."<sup>31</sup> To constitute a public use according to the first of these definitions, it is necessary that the public should in some way use or be entitled to use or enjoy the property taken. According to the second definition, it would be a public use if the property taken was so employed as to enure in any way to the public benefit or advantage.

If we go back a century and place ourselves in the situation of those who framed the constitutions of the original States, we shall find that the principal purposes, if not the only purposes, for which private property was appropriated were for ways and mills. The mills were mostly saw-mills and grist-mills, and were accustomed, and in most cases obliged, to saw and grind for toll for whomsoever applied.<sup>32</sup> They were for public use, in the stricter sense of the phrase. There was nothing in the practice of the States at the time the earlier constitutions were adopted to require that the words public use should have the meaning of public benefit or advantage.

The use of a thing is strictly and properly the employment or application of the thing in some manner.<sup>33</sup> The public use of anything is the employment or application of

will declare the act of the legislature authorizing such condemnation of private property to be unconstitutional, because it would amount to taking private property for private and not for public uses." See also *Salt Co. v. Brown*, 7 W. Va. 191, 199.

<sup>30</sup> *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 60.

<sup>31</sup> See Worcester, Webster and other lexicographers, all of whom give and illustrate these different uses of the word.

<sup>32</sup> *Port*, § 178.

<sup>33</sup> Such is the first meaning given by all lexicographers, and the one required by the etymology of the word. It is from the Latin *utor*, which means "to use, make use of, avail one's self of, employ, apply, enjoy, etc." Of course constitutional law cannot be turned into a question of etymology, but, in questions of this sort, which necessarily turn upon nice distinctions, and where there is no definite clue to guide

the thing by the public. Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question.<sup>34</sup> The reasons which incline us to this view are: First, That it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

If the constitution means that private property can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use and the act of appropriation is void. This interpretation will cover every case of appropriation that has been deemed lawful by any court, except a few in relation to mills, mines and drainage. If exceptional circumstances require exceptional legislation in those re-

us, it is proper to look at the original and controlling definition of the words employed.

<sup>34</sup> "The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn at the pleasure of the owner." *Farmers' Market Co. v. Philadelphia R. R. Co.*, 10 Pa. Co. Ct. 25. "What is a public use is incapable of exact definition. The expressions public interest and public use are not synonymous. The establishment of furnaces, mills and manufac-

tures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." *Matter of Niagara Falls & Whirlpool R. R. Co.* 108 N. Y. 375, 15 N. E. Rep. 429. And see *Matter of Split Rock Cable R. R. Co.*, 128 N. Y. 408, 28 N. E. Rep. 506; *Pocantico W. Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Board of Health v. Van Hoesen*, 87 Mich.

spects in any State, it is very easy to provide for it specially in the constitution, as has been done in several States.

On the other hand, if the constitution means that private property may be taken for any purpose of public benefit and utility, what limit is there to the power of the legislature? This view places the whole matter ultimately in the hands of the judiciary, as though the constitution read that private property may be taken for such purposes as the Supreme Court deem of public benefit or advantage. The public welfare is committed generally to the keeping of the legislature. It is a numerous body, coming directly from the people and supposed to be acquainted with their condition and needs. All questions of general public welfare and advantage fall appropriately within the province of the legislature. They have opportunities for judging correctly, ways and means of information which the courts do not and cannot have. It cannot be presumed that the people ever intended to commit such a question to the courts. Whether the public will have the use of property taken under a particular statute is a question which may be readily determined from an inspection of the statute, but whether a particular improvement will be of public utility is a question of opinion merely, about which men may differ, and which cannot be referred to any definite criterion. "The moment the mode of use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men pro-

533, 49 N. W. Rep. 894; *Fork Ridge Baptist Cem. Assn. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405. In the last case it is held, that where the property condemned will come under the control of a private corporation or individuals, to constitute a public use, it must appear: "(1) The use which the public is to have of the property must be fixed and definite; the general public must have a right to a

certain definite use of the private property, on terms and for charges fixed by law; and the owner of the property must be compelled by law to permit the general public to enjoy it. (2) This use of the property by the public must be a substantially beneficial one, which is obviously needful for the public, and which it could not do without, except by suffering great loss or inconvenience. (3) The neces-

pose to make of the property of another, that moment we are afloat without any certain principles to guide us."<sup>35</sup>

It has sometimes been said that the construction of the words public use which we have preferred would afford less security to private property than the one we have rejected. Thus, one court says: "If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad."<sup>36</sup> But certainly a hotel is also for the public benefit and advantage as well as a railroad, and is as much within one construction of the words public use as the other. But why may not the legislature provide for acquiring by condemnation a site for a hotel or theater to which the public shall have the right to resort, and which shall be subject to public regulation in its management and charges? Is not this a mere question

sity for condemnation must be obvious. It must obviously appear from the location of the property, or from the character of the use to which it is to be put, that the public could not, without great difficulty, obtain the use of this or other land, which would answer the same general purpose, unless it be condemned; and in such case the courts will judge of the necessity for condemnation."

<sup>35</sup> Tracy, Senator, in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 60. Also, in the same opinion, p. 65: "Can the constitutional expression, public use, be made synonymous

with public improvement, or general convenience or advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees? If an incidental benefit, resulting to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intentions of the constitution, it will be found very difficult to set limits to the power of appropriating private property."

<sup>36</sup> *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 411.



of expediency and public policy? And is not our opinion upon this question the outgrowth of the state of society in which we live and the usages and practices to which we are accustomed? In ancient times vast sums of money were expended in the construction and maintenance of public theaters, which were regarded as among the most important of public institutions. A proposal to condemn a site for a theater would not have sounded strange, so far as the purpose goes, in the ears of Pericles or Cicero.<sup>37</sup>

There is no constitutional limitation to the effect that the power of eminent domain shall not be exercised unless it would be otherwise impossible or difficult to accomplish the purpose sought. There are dicta to this effect, but no decisions that we are aware of.

Some discretion must be left to the legislature. It is not to be presumed that they are wholly destitute of integrity or judgment. The people have left it for them to determine for what public uses private property may be condemned. If they abuse their trust, the responsibility is not upon the courts nor the remedy in them. For further verification of the views here expressed we must refer to the subsequent sections of this chapter and the cases therein cited.

§ 166. **Highways:** Questions of public use, as affected by their character, purpose or other circumstances.—Perhaps no better example of a public use can be given than that of the ordinary highway, where the easement or right of way vests in the public for the common and equal use of all.<sup>38</sup> Private property taken for a highway is taken for public use, though the way terminates on ground used for a church and cemetery and be laid out wholly to afford access to

<sup>37</sup> In a recent case it is said: "The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the

progress of the people in education and refinement." *Attorney General v. Williams (Mass.)*, 55 N. E. Rep. 77.

<sup>38</sup> Footways and alleys are within the definition of highways. *Boston & Albany R. R. Co. v. Boston*, 140 Mass. 87; *Savannah v. Hancock*, 91 Mo. 54.

such ground,<sup>39</sup> or though it accommodates but a single family,<sup>40</sup> or though it be a mere cul de sac,<sup>41</sup> or though it be laid out in one town solely for the benefit of lands and persons belonging in another town or another State,<sup>42</sup> or though its purpose be to afford access to a farm or lumber yard.<sup>43</sup> So a highway may be laid out terminating at a State line,<sup>44</sup> or town line,<sup>45</sup> or river,<sup>46</sup> or to connect with a highway to be laid out in an adjoining county.<sup>47</sup> A highway may be laid out to form an approach to a bridge, built by a corporation created by Congress.<sup>48</sup> But a road which does not connect with or intersect any public road is not a

<sup>39</sup> West Pikeland Road, 63 Pa. St. 471; Klissinger v. Hanselman, 33 Ind. 80; Cemetery Assn. v. Meninger, 14 Kan. 312.

<sup>40</sup> Lewis v. Washington, 5 Gratt. 265; Roberts v. Williams, 15 Ark. 43; Paine v. Leicester, 22 Vt. 44; Drake v. Clay, Sneed, Ky. 139 (but see Fletcher's Heirs v. Fugate, 3 J. J. Marsh, Ky. 631); Johnson v. Supervisors of Clayton Co., 61 Ia. 89; Pagels v. Oaks, 64 Ia. 198; contra: Knowles' Petition, 22 N. H. 361; Underwood v. Bailey, 59 N. H. 480. In Richards v. Wolf, 82 Ia. 358, 47 N. W. Rep. 1044, it was held that a highway could not be laid out which would be practically for the convenience of one person, whose land abutted on another highway. The prior cases above cited from the same State were distinguished. See Matter of Whitestown, 24 N. Y. Misc. 150.

<sup>41</sup> Schatz v. Pfeil, 56 Wis. 429; People v. Van Alstyne, 3 Keyes 35; Sheaff v. People, 87 Ill. 189; Masters v. McHolland, 12 Kan. 17; Cemetery Assn. v. Meninger, 14 Kan. 312; Fields v. Colby, 102 Mich. 450, 60 N. W. Rep.

1048. But see Holdane v. Village of Cold Spring, 23 Barb. 103; Holdane v. Cold Spring, 21 N. Y. 474; Greene v. O'Connor, 18 R. I. 56, 25 Atl. Rep. 692; Mabler v. Brumder, 92 Wis. 477, 66 N. W. Rep. 502; Matter of Burdick, 27 N. Y. Misc. 298.

<sup>42</sup> Gilman v. Westfield, 47 Vt. 20; Crosby v. Hanover, 36 N. H. 404.

<sup>43</sup> State v. Bishop, 39 N. J. L. 226; Masters v. McHolland, 12 Kan. 17; Robinson v. Winch, 66 Vt. 110, 28 Atl. Rep. 884. See Matter of Lawton, 24 N. Y. Misc. 426.

<sup>44</sup> Rice v. Rindge, 53 N. H. 530.

<sup>45</sup> Goodwin v. Wethersfield, 43 Conn. 437.

<sup>46</sup> Watson v. Town Council of South Kingstown, 5 R. I. 562; Moore v. Ange, 125 Ind. 562, 25 N. E. Rep. 816.

<sup>47</sup> Peckham v. Town of Lebanon, 39 Conn. 231. If the statute requires a highway to lead to some public point or place, a highway terminating at a railroad is bad. Road in Upper Darby, 2 Pa. Co. Ct. 366.

<sup>48</sup> Luxton v. North Riv. Bridge Co., 153 U. S. 525.

highway and cannot be laid out as such.<sup>49</sup> It is immaterial what the object of travel on the road may be, whether pleasure or business. The proper authorities may lay out roads to accommodate all lawful travel. It has accordingly been held that highways may be laid out for the purpose of affording access to points which command a fine view or are resorted to for pleasure.<sup>50</sup> So the public nature of the use is not affected by the fact that the expense is defrayed in whole or in part by private contribution,<sup>51</sup> but it has been held that a road which is not of public utility cannot be laid out merely because private parties are willing to defray the expense.<sup>52</sup> Land taken for a ditch to drain and improve a highway is taken for a public use.<sup>53</sup> In the absence of special statutory or constitutional provisions it is for the proper public authorities to determine whether a particular highway is necessary and proper, and with this question the courts have nothing to do. A highway is a public use, but the need of it is a question of expediency.<sup>54</sup>

§ 167. **Private roads.**—Laws have existed, and, perhaps, do still exist in most of the States for the laying out of what are usually called private roads, but which are also called in some States, township, neighborhood or pent roads. These statutes have in some cases been held valid, and in others invalid. There is, however, but little, if any, real conflict of

<sup>49</sup> *State v. Price*, 21 Md. 448; *Snow v. Town of Sandgate*, 66 Vt. 461, 29 Atl. Rep. 673.

<sup>50</sup> *Higginson v. Nahant*, 11 Allen 530; *Petition of Mount Washington Road Co.*, 35 N. H. 134.

<sup>51</sup> *Dwiggins v. Denver*, 2x Ohio St. 629; *Parks v. Boston*, 8 Pick. 218; *Copeland v. Packard*, 16 Pick. 217; *Patchen v. Doolittle*, 3 Vt. 457; *Inhabitants of Vassalborough*, 19 Me. 338; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. Rep. 224; *State v. City of Orange*, 54 N. J. L. 111, 22 Atl. Rep. 1004; *Bern v. Penn Tp. Road*, 2 Monaghan (Pa.

Supm.) 105; *Chicago etc. R. R. Co. v. Naperville*, 169 Ill. 25; *Coombs v. County Comrs.*, 68 Me. 484; *State v. New Brunswick*, 53 N. J. L. 225, 33 Atl. Rep. 477; *Butts v. Geary County*, 7 Kans. App. 302.

<sup>52</sup> *Blackman v. Halves*, 72 Ind. 515; *Dudley v. Cilley*, 5 N. H. 558; *Hampton v. Poland*, 50 N. J. L. 367, 13 Atl. Rep. 174; *Commonwealth v. Sawin*, 2 Pick. 547. And see *Frederick Street*, 12 Pa. Co. Ct. 577.

<sup>53</sup> *Smeaton v. Martin*, 57 Wis. 364.

<sup>54</sup> *Post*, § 238; *Opp v. Timmons*, 149 Ind. 236.

authority, as appears when the cases are examined and compared. The key to their reconciliation is to be found in the fact that the phrase *private roads* or *private ways* is used in different States and different statutes to designate roads of entirely different character. Where the road, though laid out on the application and paid for and kept in repair by a particular individual who is especially accommodated thereby, is, in fact, a public road and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned.<sup>55</sup> But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private, and the law authorizing the condemnation of property therefor is void.<sup>56</sup> In many cases, it will be found, the con-

<sup>55</sup> *Shaver v. Starrett*, 4 Ohio St. 494; *Ferris v. Bramble*, 5 Ohio St. 109; *Denham v. County Coms. of Bristol*, 108 Mass. 202; *Davis v. Smith*, 130 Mass. 113; *Wolcott v. Whitcomb*, 40 Vt. 40; *Whitingham v. Bowen*, 22 Vt. 317; *Brock v. Barnett*, 57 Vt. 172; *Roberts v. Williams*, 15 Ark. 43; *Perrine v. Farr*, 22 N. J. L. 356; *Metcalf v. Bingham*, 3 N. H. 459; *Proctor v. Andover*, 42 N. H. 348; *Clark v. Boston etc. R. R. Co.*, 24 N. H. 118; *Hickman's Case*, 4 Harr. (Del.) 580; *Sherman v. Bulck*, 32 Cal. 241; *Butte Co. v. Boydston*, 64 Cal. 110; *Brewer v. Bowman*, 9 Ga. 37; *Monterey County v. Cushing*, 83 Cal. 507, 23 Pa. Rep. 700; *Los Angeles County v. Reyes* (Cal.), 32 Pac. Rep. 233; *Latah County v. Peterson*, 2 Idaho 1118, 29 Pac. Rep. 1089; *County of Douglas v. Clark*, 15 Or. 3, 16 Pac. Rep. 420. The text is sustained in *Towns v. Klammath County*, 33 Or. 225, 53 Pac.

Rep. 604, in which the court says: "If, by a fair construction and operation of the statutes, the road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application of, paid for and kept in repair by the petitioner, and primarily designed for his benefit; but if such road is to become a mere private way, and not open to the public, the law sanctioning it is void," p. 232. See also *Sullivan v. Kline*, 33 Or. 260, 54 Pac. Rep. 154.

<sup>56</sup> *Sadler v. Langham*, 34 Ala. 311; *Rice v. Alley*, 1 Sneed 51; *Osborn v. Hart*, 24 Wis. 89; *Wild v. Delg*, 43 Ind. 455; *Stewart v. Hartman*, 46 Ind. 331; *Clack v. White*, 2 Swan, 540; *Taylor v. Proctor*, 4 Hill, 140; *Nesbitt v. Trumbo*, 39 Ill. 110; *Crear v. Crossly*, 40 Ill. 175; *Bankhead v. Brown*, 25 Ia. 540; *Dickey v.*

stitutional question is not raised or considered.<sup>57</sup>

Whether a private way is the exclusive property of the applicant or is open to public use must be determined from the statute. If the statute provides that it shall be for public use,<sup>58</sup> or for the exclusive use of the applicant, that settles the question.<sup>59</sup> If any part of the expense may be imposed upon the public, that circumstance would indicate that it was intended to be for the use of the public.<sup>60</sup> Where the statute provides that the applicant shall pay the cost of the road and that it shall be for the use of himself, his heirs or assigns, it will be deemed to intend that the road shall be private property, and the act will be void.<sup>61</sup>

Tennison, 27 Mo. 373; Burgwyn v. Lockhart, Winston Law, 269; Plimmons v. Frisby, *ibid*, 201; Witham v. Osburn, 4 Oregon, 318; Mohawk & Hudson R. R. Co. v. Artcher, 6 Paige, 83; Varner v. Martin, 21 W. Va. 534; Logan v. Stogdale, 123 Ind. 372, 24 N. E. Rep. 135; Shake v. Frazer, 94 Ky. 143, 21 S. W. Rep. 583; Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559; Beaudrot v. Murphy, 53 S. C. 118, 30 S. E. Rep. 825.

<sup>57</sup> North Berwick v. Commissioners of York, 25 Me. 69; McCauley v. Dunlap, 4 B. Mon. 57; Rout v. Mountjoy, 3 B. Mon. 300; Jones' Heirs v. Barclay, 2 J. J. Marsh. 73; Ryker v. McElroy, 28 Ind. 179; Reynolds v. Reynolds, 15 Conn. 83; Singleton v. Commissioners, 2 Nott & McC. 526; Lyon v. Hamor, 73 Me. 56; Owings v. Worthington, 10 G. & J. 283; Road Case, 4 Yates, 514; Littlejohn v. Cox, 15 La. An. 67; Perry v. Webb, 21 La. An. 247; Leach v. Day, 27 Cal. 643; Bradford v. Cole, 8 Fla. 263; Hall v. Pettit, 88 Mich. 158, 50 N. W. Rep. 117; Warlick v. Low-

man, 103 N. C. 122, 9 S. E. Rep. 458; Burwell v. Sneed, 104 N. C. 118, 10 S. E. Rep. 152; Warlick v. Lowman, 104 N. C. 403, 10 S. E. Rep. 474.

<sup>58</sup> Loveland v. Town of Berlin, 27 Vt. 713.

<sup>59</sup> Wild v. Delg, 43 Ind. 455. But in Logan v. Stogdale, 123 Ind. 372, 24 N. E. Rep. 135, an act, which authorized the laying out of "branch highways" on the petition of any freeholder who had no outlet to a highway, was held void, though the roads provided for were declared to be highways.

<sup>60</sup> Denham v. County Commissioners, 108 Mass. 202. Here the statute authorized the laying out of "private ways for the use of one or more of the inhabitants," but the applicant was only to pay such part of the cost as the commissioners should deem reasonable, and the residue, if any, was to be paid by the town. In the particular case the applicant paid the whole cost, but it was held a public way.

<sup>61</sup> Nesbitt v. Trumbo, 39 Ill. 110; Taylor v. Porter, 4 Hill,

Where the act provides that the road shall be laid out on the application of the individual or individuals to be benefited, who are to pay the expense of its establishment and maintenance, and gives no other indication of intent, it is generally held to provide for a strictly private road, and to be void.<sup>62</sup> The Supreme Court of Iowa assigns the following reasons for this conclusion:

"First. The statute denominates them 'private roads,' and is entitled, 'an act to provide for establishing private roads.' If the roads established thereunder were not intended to be private, and different from ordinary and public roads, there was no necessity for the act.

"Second. Such road may be established on the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe.

"Third. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private.

"Fourth. We see no reason, when such a road is established, why the person at whose instance this was done, might not lock the gates opening into it, or fence it up, or otherwise debar the public to any rights thereto."<sup>63</sup>

On the other hand, such roads have been held public on the ground that it was the duty of the court so to construe the act, if possible, as to make it valid,<sup>64</sup> and this even in case of an act which provided that the roads should "be, to all intents and purposes, private roads for the use of the parties interested."<sup>65</sup> Though the cost and repair of the

140; *Osborn v. Hart*, 24 Wis. 89; *Varner v. Martin*, 21 W. Va. 534.

<sup>62</sup> *Bankhead v. Brown*, 25 Ia. 540; *Witham v. Osburn*, 4 Oregon 318; *Wild v. Deig*, 43 Ind. 455 (overruling *Kissinger v. Hansleman*, 33 Ind. 80); *Stewart v. Hartman*, 46 Ind. 331; *Dickey v. Tennison*, 27 Mo. 373; *Sadler v. Langham*, 34 Ala. 311.

<sup>63</sup> *Bankhead v. Brown*, 25 Ia. 540, 547.

<sup>64</sup> *Roberts v. Williams*, 15 Ark. 43.

<sup>65</sup> *Sherman v. Buick*, 32 Cal. 241, 251. In this case the court, referring to the legislature, say: "By distinguishing or classifying roads or highways by the words 'public' and 'private,' and pro-

road are cast upon the applicant, yet, if the repairs are sub-

viding different modes for their establishment and support, and declaring that the latter class 'shall be, to all intents and purposes, private roads for the use of parties interested,' they give color to the idea that, in their judgment, they have the power to create and are creating a road for private use, and to make and are making it the private property of certain persons to the exclusion of all others. If we look solely at their language without regard to the true nature of the only power which they possessed in the premises, an impression that the property of the owner of the land is taken for private use is created, for there is an apparent, if not an express, appropriation of it to the use of certain parties to the exclusion of all others. But it is well understood that the language of the legislature is to be read in all cases by the light of the constitution, with the spirit of which it is always presumed to be consistent. In construing it, it is the duty of the courts to look to the true object and to trace out the true result, and not to be guided by those which the legislature has mistakenly assumed or declared; and if they be found to be consistent with the constitution, or within the acknowledged power of the legislature, to uphold the act as to its legitimate results and to discard all else. Thus, if the legislature provides for the laying out and establishing of a certain class of roads or highways which

from any cause, whether for the purposes of classification or otherwise, is denominated 'private,' or as being for the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the individuals designated, even if the legislature has so provided in express terms; for where roads are laid out, whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence as being public. In other words, the legislature has no power to lay out and establish 'private roads,' in the sense that they are to be the private property of particular individuals, or that they are what are denominated 'private ways' at common law; and hence, so far as they undertake to do so, their action is simply null and void; but the road so laid out and established becomes a way over which all may lawfully pass who have occasion, and therefore public; and the language employed by the legislature, so far as it relates to the legal character of the road—as public or private—must be understood as being used for the purpose of distinguishing it from all other roads, or, in general terms, for the purposes of classification."

ject to the supervision and control of public officers, it will be deemed a public road.<sup>66</sup>

In Kentucky a statute has existed since 1820 providing for the establishment of private passways over the land of others, when necessary to enable a citizen "to attend courts, elections, a meeting-house, a mill, a warehouse, ferry, *to pass from one tract of land to another owned by him, or railroad depot most convenient to his residence.*"<sup>67</sup> The validity of this statute passed unchallenged for many years,<sup>68</sup> but was finally passed upon in *Robinson v. Swope*.<sup>69</sup> It seems to have been conceded that all such passways were private property. The court, in view of the long acquiescence in the enforcement of the statute and the manifest utility of such ways and of the statute being in force when the present constitution was adopted, sustain the act, except the clause in italics, which, being a recent introduction and not of public utility, was held void. The same view is implied in *Georgia*<sup>70</sup> and perhaps also in *Connecticut*,<sup>71</sup> though in neither State has the point been decided. In *Pennsylvania* statutes have existed for the establishment of private roads since 1735.<sup>72</sup> They may be laid out from "dwellings and plantations to a highway or

<sup>66</sup> *Hickman's Case*, 4 Harr. (Del.) 580, and Statutes of Delaware.

<sup>67</sup> Statutes of Ky. 1883, p. 770.

<sup>68</sup> *Jones' Heirs v. Barclay*, 2 J. Marsh, 73; *McCauley v. Dunlap*, 4 B. Mon. 57; *Rout v. Mountjoy*, 3 B. Mon. 300; *Troutman v. Barnes*, 4 Met. (Ky.) 337.

<sup>69</sup> 12 Bush. 21. "We have no hesitation in holding," says the court, "that the general assembly may, in the exercise of the right of eminent domain, authorize the establishment of private passways over the lands of others when it is necessary to enable any inhabitant of the State to attend courts, elections, or mills, or to reach an established

public highway." p. 25. It is to be observed, however, that the point decided in this case was that such a way could not be laid out to pass from one tract of a man's land to another, and that, consequently, the remainder of the opinion is dictum. *Shake v. Frazer*, 94 Ky. 143, 21 S. W. Rep. 583, is a similar case.

<sup>70</sup> *Brewer v. Bowman*, 9 Ga. 37. The law was held void because it did not provide for compensation.

<sup>71</sup> *Reynolds v. Reynolds*, 15 Conn. 83. The court here expressly decline to consider the question because not properly raised.

<sup>72</sup> *Waddell's Appeal*, 84 Pa. St. at p. 92.



place of necessary public resort, or to any private way leading to a highway."<sup>73</sup> The roads here provided for are spoken of as quasi public,<sup>74</sup> and have been sustained as a valid exercise of the power of eminent domain.<sup>75</sup> It has been held under other statutes in that State that a right of way for mere private use cannot be condemned.<sup>76</sup> It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified. It is undoubtedly within the power of the legislature to lay out public ways to connect private premises with a public way or place of public resort.<sup>77</sup> It is a question for the legislature whether the public welfare will be promoted by such an appropriation.

It has been held that where one has a way of necessity over the land of another at common law, it is competent for the legislature to prescribe how this shall be established, and that such a law would not divest private property for private use, but only regulate the exercise of an existing private right.<sup>78</sup> The owner of land taken for a private road may waive the unconstitutionality of the act and recover the damages awarded.<sup>79</sup> In some States the laying out of private ways is expressly sanctioned by the constitution,<sup>80</sup>

<sup>73</sup> Purdon's Statutes, p. 646. Act 13, June, 1836.

<sup>74</sup> Waddell's Appeal, 84 Pa. St. 90, 94.

<sup>75</sup> Pocopsen Road, 16 Pa. St. 15; also, Stuber's Road, 28 Pa. St. 199; Sandy Lick Creek Road, 51 Pa. St. 94; Keeling's Road, 59 Pa. St. 358.

<sup>76</sup> McCaudless' Appeal, 70 Pa. St. 210; Waddell's Appeal, 84 Pa. St. 90.

<sup>77</sup> Bankhead v. Brown, 25 Ia. 540, 554; Witham v. Osburn, 4 Oregon, 318; Wild v. Deig, 43 Ind. 455; and see Lewis v. Washington, 5 Gratt, 265.

<sup>78</sup> Snyder v. Warford, 11 Mo. 513; Lawrence, J., in Crear v.

Crcssly, 40 Ill. 175.

<sup>79</sup> Post, §167. One who has petitioned for a private road and used it, will be estopped from denying the validity of the proceedings when sued for the damages awarded. Fernald v. Palmer, 83 Me. 244, 22 Atl. Rep. 467.

<sup>80</sup> Michigan constitution, art. 13, sec. 14; Scheh v. Detroit, 45 Mich. 626; Ayres v. Richards, 38 Mich. 214; South Carolina constitution, art. 1, sec. 23; State v. Stockhouse, 14 S. C. 417. Alabama, art. 1, sec. 5; Steele v. County Comrs., 83 Ala. 304. Colorado, art. 2, sec. 14. Georgia, art. 1, secs. 17, 20; Normandale Lumber Co. v. Knight, 89 Ga.

or the constitution is construed as giving such authority.<sup>81</sup> A constitutional provision authorizing the taking of lands for private ways of necessity, is not self-executing, and such ways cannot be laid out without statutory authority.<sup>82</sup> When private ways are permitted by the constitution when certain conditions exist, these conditions must be affirmatively shown in order to justify the exercise of the power.<sup>83</sup> Where the constitution sanctions the establishment of "private ways of necessity," or "in cases of necessity,"<sup>84</sup> one cannot be laid out simply because it will be more convenient or less expensive for the applicant, than one on his own land.<sup>85</sup> To create such a necessity as is contemplated, it is probable that the applicant's land would have to be surrounded by the land of others.<sup>86</sup> The statutory power to lay out private roads of any description must be strictly

111, 14 S. E. Rep. 882. Missouri, art. 2, sec. 20; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. Rep. 656. Montana, art. 3, sec. 15; *State v. District Court*, 14 Mon. 476, 37 Pac. Rep. 7. Washington, art. 1, sec. 16; *Long v. Billings*, 7 Wash. 267, 34 Pac. Rep. 936. New York, art. 1, sec. 7; and see Illinois, art. 4, sec. 30.

<sup>81</sup> Art. 1, sec. 14 of the constitution of Idaho provides as follows: "The necessary use of lands for reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, \* \* \* or any other use necessary to the complete development of the material resources of the state, \* \* \* is hereby declared to be a public use." This was held to authorize the laying out of private roads. *Latah County v. Peterson*, 2 Idaho 1118, 29 Pac. Rep. 1089. "The necessity for such private roads is apparent

when it is stated that it would be impossible to improve very many valuable tracts of land in this state which are not reached by public highways, unless this power existed. Such roads are therefore necessary to the complete development of the material resources of the state."

<sup>82</sup> *Long v. Billings*, 7 Wash. 267, 34 Pac. Rep. 936.

<sup>83</sup> *Long v. Billings*, 7 Wash. 267, 34 Pac. Rep. 939; *Latah County v. Peterson*, 2 Idaho 1118, 29 Pac. Rep. 1089; *State v. District Judge*, 14 Mon. 476, 37 Pac. Rep. 7; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. Rep. 656; *Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. Rep. 882.

<sup>84</sup> See constitutional provisions of Colorado, Missouri and Washington above cited, note 80.

<sup>85</sup> *Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. Rep. 882.

<sup>86</sup> *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. Rep. 656.

complied with and all the conditions precedent must be shown to exist.<sup>87</sup>

§ 168. **Toll roads, bridges and ferries.**—Property taken for toll roads, toll bridges and ferries is taken for public use.<sup>88</sup> They are public highways which every member of the public is entitled to use, and do not differ in any essential particular from the common highway opened and maintained at the expense of the public.<sup>89</sup>

§ 169. **Canals.**—Canals to be used as highways by water are a public use.<sup>90</sup> But more water cannot be taken than is necessary for navigation, for the purpose of selling it to

<sup>87</sup> *Hall v. Pettit*, 88 Mich. 158, 50 N. W. Rep. 117; *Warlick v. Lowman*, 103 N. C. 122, 9 S. E. Rep. 458; *Burwell v. Sneed*, 104 N. C. 118, 10 S. E. Rep. 152; *Warlick v. Lowman*, 104 N. C. 433, 10 S. E. Rep. 474; *In re Road in Brechnock Tp.*, 2 Woodward's Decs. (Pa.) 437; *Breaux v. Bienvenue*, 51 La. An. 687, 25 So. Rep. 321.

<sup>88</sup> *Arnold v. Covington & Cincinnati Bridge Co.*, 1 Duval 372; *Young v. Buckingham*, 5 Ohio 485; *Plecker v. Rhodes*, 30 Gratt. 795. A horse ferry is a public use. *Day v. Stetson*, 8 Me. 365; *Young v. McKenzie*, 3 Ga. 31. So of land taken for an approach to a public ferry. *Drake v. Clay*, *Sneed*, 139. Or a bridge. *Luxton v. North Riv. Bridge Co.*, 153 U. S. 525.

<sup>89</sup> "A road constructed and supported by a turnpike corporation differs in no essential characteristic from a common highway, established and supported by a town, a borough, or a city. Their origin and objects are identical. Both emanate from the same supreme power, acting through the legislature, the courts, or other

depositories of authority designated by the laws. Both are called into existence, and supported, to subserve, in exactly the same way, the public necessities and convenience, and both alike are intended to endure for an indefinite period, and so long as that convenience requires or that necessity exists. The funds for making and repairing them, indeed, are drawn from different sources and in different modes—the one, from travelers by a toll—the other, from the community by a tax; and the turnpike company is permitted to take, for the benefit of its stockholders, the contingent profits in compensation for the contingent losses of the enterprise; but still the public interest in the road and the burden upon the land are essentially the same in both." *State v. Maine*, 27 Conn. 641, 646.

<sup>90</sup> *Willyard v. Hamilton*, 7 Ohio (pt. 2) 111; *Matter of Peter Townsend*, 39 N. Y. 171; *Chesapeake etc. Canal Co. v. Key*, 3 Cranch, C. C. 599; *Dalles Lumbering Co. v. Urquhart*, 16 Or. 67, 19 Pac. Rep. 78; *Kaukauna*

private individuals for power or other use.<sup>91</sup> But so long as the state acts in good faith and with a bona fide intent of promoting the main purpose in view, it may dispose of any surplus water or water power, incidentally taken or created, for private uses and appropriate the proceeds of such disposition.<sup>92</sup> Where the water of a stream was taken for a

Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 S. C. Rep. 173.

<sup>91</sup> Cooper v. Williams, 5 Ohio, 391; Buckingham v. Smith, 10 Ohio 288; Varick v. Smith, 5 Paige, 137.

<sup>92</sup> Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 S. C. Rep. 173. Here the state constructed a dam for the bona fide purpose of furnishing water to a public canal and it was held that it was entitled to the water power incidentally created and could dispose of it to private parties. The court says: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the

purposes of navigation at all seasons of the year. So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circumstances of this case we think it within the power of the state to retain within its immediate control such surplus as might incidentally be created by the erection of the dam." The court cites the following cases as supporting its conclusions: Cooper v. Williams, 4 Ohio 253; Buckingham v. Smith, 10 Ohio 288; Little Miami

canal and the supply of a mill cut off, it was held that a raceway could not be made through private property from the canal to the mill in order to supply it with water, the mill-owner having agreed to accept the same in lieu of damages for interfering with the stream. This would be taking one man's property to make compensation to another.<sup>93</sup> A canal to supply water for mining, manufacturing, irrigation and domestic use has been held to be a public purpose.<sup>94</sup>

**§ 170. Railroads, their connections and appurtenances.**—When railroads were first introduced, some question was made as to their being a public use, but it has long been settled that they are.<sup>95</sup> A railroad company may be authorized to condemn land for all appurtenances neces-

*Elevator Co. v. Cincinnati*, 30 Ohio St. 629, 643; *Hubbard v. City of Toledo*, 21 Ohio St. 379; *Fox v. Cincinnati*, 104 U. S. 783; *Spaulding v. Lowell*, 23 Pick. 11, 80; *French v. Inhabitants of Quincy*, 3 Allen 9; *Attorney General v. Eau Claire*, 37 Wis. 403; *State v. Eau Claire*, 40 Wis. 533.  
<sup>93</sup> *McArthur v. Kelley*, 5 Ohio 139.

<sup>94</sup> *Cummings v. Peters*, 55 Cal. 593.

<sup>95</sup> *Aldridge v. T. C. & D. R. R. Co.*, 2 Stew. & Por. 199; *Davis v. Same*, 4 Ibid. 421; *Cairo & Fulton R. R. Co., v. Turner*, 31 Ark. 494; *San Francisco A. & S. R. R. Co. v. Caldwell*, 31 Cal. 367; *O'Hara v. Lexington & Ohio R. R. Co.*, 1 Dana (Ky.) 232; *Whiteman v. W. & S. R. R. Co.*, 2 Harr. (Del.) 514; *The Bellona Company Case*, 3 Bland, Chy. 442; *Swan v. Williams*, 2 Mich. 427; *Brown v. Beatty*, 34 Miss. 227; *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige 45; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 14 Wend. 51;

*Same v. Same*, 18 Wend. 9; *Buffalo & New York R. R. Co. v. Brainard*, 9 N. Y. 100; *Seacomb v. Milwaukee etc. R. R. Co.*, 49 How. Pr. 75; *Concord Railroad Co. v. Greeley*, 17 N. H. 47; *Louisville etc. R. R. Co. v. Appell*, Rice (18 S. C.) 383; *Buffalo, Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Baldwin, U. S. 205; *Baltimore & Ohio R. R. Co. v. Van Ness*, 4 Cranch 595; *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40; *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana 289. *Moran v. Ross*, 79 Cal. 159, 21 Pac. Rep. 547; *Shreveport & A. R. R. Co. v. Hollingsworth*, 42 La. An. 729, 7 So. Rep. 693; *Davidson v. County Comrs.*, 18 Minn. 482; *Cherokee Nation v. Southern Kansas R. R. Co.*, 33 Fed. Rep. 900. See *People v. Salem*, 20 Mich. 452.

sary to the convenient and proper operation of the road, such as depots,<sup>96</sup> freight houses,<sup>97</sup> yard room,<sup>98</sup> side tracks,<sup>99</sup> gravel pits,<sup>1</sup> and the like.<sup>2</sup> But property cannot be taken for things not necessary to the operation of the road or which do not require a particular location with reference to the right of way, such as tenement houses for employees,<sup>3</sup> and shops for manufacturing new rolling stock.<sup>4</sup> It has

<sup>96</sup> *Geizy v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308; *Hannibal & St. Joe R. R. Co. v. Muder*, 49 Mo. 165; *Matter of New York Central etc. R. R. Co.*, 59 Hun 7; *Small v. Georgia etc. R. R. Co.*, 87 Ga. 602, 13 S. E. Rep. 694; *State v. Railroad Comrs.*, 56 Conn. 308; *Ewing v. Ala. & V. R. R. Co.*, 68 Miss. 551, 9 So. Rep. 295.

<sup>97</sup> In *Matter of New York etc. R. R. Co. v. Kip*, 46 N. Y. 546; *Matter of New York Central etc. R. R. Co.*, 77 N. Y. 248; *New York Central etc. R. R. Co. v. Metropolitan Gas Light Co.*, 5 Hun 201. Right to take for warehouse questioned, *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. St. 23.

<sup>98</sup> *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137.

<sup>99</sup> *St. Louis etc. R. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. Rep. 884.

<sup>1</sup> *Hopkins v. Florida Cent. etc. R. R. Co.*, 97 Ga. 107, 25 S. E. 452; *Saginaw etc. R. R. Co. v. Bordner*, (Mich.) 66 N. W. Rep. 62.

<sup>2</sup> The question is extensively considered in *Milwaukee etc. R. R. Co. v. Milwaukee*, 34 Wis. 271. A statute exempted from taxation the property of a railroad necessarily used in operating its road. The exemption was held

to be co-extensive with the right of the company to take by condemnation. It was held indirectly that the company could not condemn for grain elevators nor for a building used chiefly for a hotel, though incidentally for a station.

<sup>3</sup> *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137; *State v. Commissioners of Mansfield*, 23 N. J. L. 510.

<sup>4</sup> *Eldridge v. Smith*, 34 Vt. 481, 493; *Matter of New York etc. R. R. Co. v. Kip*, 46 N. Y. 546, 552; *West River Bridge Co. v. Dix*, 6 How. 507, 546. In the first case the court say: "Is an establishment for the manufacture of railroad cars a legitimate railroad purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron, in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have

been held that property may be condemned for repair shops and that this would be a public use.<sup>5</sup> These differ, undoubt-

wood, sleepers, and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners? They must have glass, nails, paint, and many other things. Can they by compulsory measures provide themselves the means to manufacture them all? We think it very clear they cannot. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroads do not usually engage at all; and in this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them.

"Although railroad companies must have engines and cars, iron, lumber, wood, and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids

to their successful development. The company must have shops for the repair of cars and engines, as they are so often needed, and as they cannot well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity, so that the company could properly condemn land on which to erect one."

<sup>5</sup> For "depot, engine house and repair shops," *Hannibal & St. Joe R. R. Co. v. Muder*, 49 Mo. 165; for "turn-outs, depots, engine houses, shops and turn-tables," *C. B. & Q. R. R. Co. v. Wilson*, 17 Ill. 123; for a "paint shop, and lumber and timber sheds," *Low v. Galena & Chicago Union R. R. Co.*, 18 Ill. 324. In the Illinois cases the constitutional question of public use was not raised. The only question was whether the purposes specified were within the statute. Nor does it appear that the constitutional question was actually raised in the Missouri case. After referring to the cases from Illinois and Vermont the court say: "All these adjudications proceed upon the assumption that the appropriation of land, for the purpose stated in the plaintiff's petition, is an appropriation of private property to a public use." p. 166. See also *Eldridge v.*

edly, from shops for the manufacture of new cars, or engines, since the former are indispensable to every railroad, while the latter are not. New rolling stock can be purchased of those who make a business of its manufacture. But facilities for the repair of such stock do not usually exist within any practicable distance, and unless the companies could have such facilities conveniently located, they might be hampered in their service and the public greatly incommoded. A railroad company may condemn land for a track to a public warehouse or elevator,<sup>6</sup> or to connect with a wharf or pier,<sup>7</sup> or for the purpose of diverting a stream in order to avoid a bridge, where the public safety will thereby be promoted.<sup>8</sup> "Whatever is essential and indispensable to the construction, maintenance or running of the road, is allowed to be taken."<sup>9</sup> Where, under a general railroad law, a road is built for private use, its operation may be enjoined at the suit of an individual,<sup>10</sup> or the franchise annulled at the suit of the people.<sup>11</sup> The question of public use does not depend upon the length of the road and a company organized to build a connecting link between two other roads which are separated by a river, is for a public use and may exercise the right of eminent domain.<sup>12</sup> A railroad built from Denver east to the State line to coal mines of the company, and equipped and operated in the

Smith, 34 Vt. 484, and quotation in last note.

<sup>6</sup> Fisher v. C. & S. R. R. Co., 104 Ill. 323; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155. A city may grant permit to lay a track in a street to a private elevator. Clarke v. Blackmar, 47 N. Y. 150.

<sup>7</sup> Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137.

<sup>8</sup> Reusch v. C. B. & Q. R. R. Co., 57 Ia. 687.

<sup>9</sup> New York etc. R. R. Co. v. Gunnison, 1 Hun 496, 497.

<sup>10</sup> A road between the mines and mill of a company, McCaud-

less' Appeal, 70 Pa. St. 210; see also Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257; Weidenfeld v. Sugar Run R. R. Co., 48 Fed. Rep. 615.

<sup>11</sup> A road to transport coal from the company's mine a distance of about five miles. People v. Pittsburgh R. R. Co., 53 Cal. 694. So of a road used and equipped only for transporting coal from the private mines of the company's stockholders. State v. Railway Co., 40 Ohio St. 504.

<sup>12</sup> Niemeyer v. Little Rock Junction R. R. Co., 43 Ark. 111.



usual way for the transportation of freight and passengers, was held a public use.<sup>13</sup> That a road is limited to the transportation of freight does not make it for private use.<sup>14</sup> A company was organized to provide terminal facilities for railroads, and could be compelled to furnish such facilities upon terms fixed by the railroad commissioner in case of disagreement, and which was authorized and, on certain conditions, could be compelled to construct tracks and operate suburban trains, was held to be for a public purpose and such a company as could be vested with the power of eminent domain.<sup>15</sup> It is no objection that a railroad is built especially for the accommodation of certain mines, so long as it is in law a public highway and prepared to carry for all who desire its service.<sup>16</sup> But a railroad used exclusively for transporting coal or freight for its stockholders and which has no depots, freight houses, or facilities for doing a public business, is a private enterprise.<sup>17</sup> But such railroads are authorized by the constitution in South Carolina.<sup>18</sup> A railroad in the gorge of the Niagara river, from the falls to the "whirlpool," which could not be reached without passing over the State reservation or private property, along which no habitations could be built and on which no freight could be carried, and which could only be used for conveying sight-seers along the river during the summer months, was held not to be such a road as was contemplated by the general statutes of New York, and not a public use, for which the power of eminent domain could be exercised.<sup>19</sup>

<sup>13</sup> Colorado Eastern R. R. Co. v. Union Pac. R. R. Co., 41 Fed. Rep. 293. And see Denver R. Land & Coal Co. v. Union Pac. R. R. Co., 34 Fed. Rep. 386.

<sup>14</sup> Brown v. Chicago etc. R. R. Co., 137 Mo. 529.

<sup>15</sup> Fort St. Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. Rep. 228, 3 Am. R. R. & Corp. Rep. 433.

<sup>16</sup> Butte etc. R. R. Co. v. Mon-

tana U. R. R. Co., 16 Mon. 504, 41 Pac. Rep. 232.

<sup>17</sup> State v. Railway Co., 40 Ohio St. 504; Weidenfeld v. Sugar Run R. R. Co., 48 Fed. Rep. 615.

<sup>18</sup> Ex parte Bacot, 36 S. C. 125, 15 S. E. Rep. 204.

<sup>19</sup> Matter of Niagara Falls & Whirlpool R. R. Co., 108 N. Y. 375, 15 N. E. Rep. 429; Matter

§ 171. **Lateral and branch railroads, switch and spur tracks to private property.**—Certain decisions in Pennsylvania have sometimes been understood as laying down the doctrine that private property could be taken for a lateral railroad connecting a mine or mill with a railroad, canal or navigable stream, though the lateral road was for the private use of the owner of the mine or mill.<sup>20</sup> The Supreme Court of that State seems to have so understood itself at an early date,<sup>21</sup> but afterwards discovered its mistake.<sup>22</sup> An act of 1832 provided that the owners of any land, mills, quarries, coal mines, lime-kilns or other real estate might condemn lands for a railroad to any railroad, canal or navigable stream not exceeding a distance of three miles. Section seven of the act provided that any person could use the road for the transportation of freight on the payment of a certain specified compensation.<sup>23</sup> This statute has remained in force until the present time. These lateral roads, therefore, are for public use, and the cases referred to form no exception to the general current of authority.<sup>24</sup> Similar roads are sanctioned in Maryland, where, though constructed for the particular advantage of individuals, they are also open to the public as occasion requires.<sup>25</sup> The legislature of Missouri, by special charter, authorized a company to construct a railroad from its coal lands to the Missouri river, but provided that it should be a public carrier of passengers and freight. It was rightly held to

of Niagara Falls & Whirlpool R. R. Co., 121 N. Y. 319, 24 N. E. Rep. 452; and see *Matter of Split Rock Cable Road Co.*, 128 N. Y. 408, 28 N. E. Rep. 506. Compare ante § 166; post § 175.

<sup>20</sup> *Harvey v. Thomas*, 10 Watts, 63; *Harvey v. Lloyd*, 3 Pa. 331; *Shoenberger v. Mulhollan*, 8 Pa. 134; *Hays v. Risher*, 32 Pa. 169; *Brow v. Corey*, 43 Pa. 495.

<sup>21</sup> *Harvey v. Thomas*, 10 Watts 63.

<sup>22</sup> *Hays v. Risher*, 32 Pa. St. 169.

<sup>23</sup> *Purdon's Statutes*, p. 492; see also *Boyd v. Negley*, 40 Pa. St. 377.

<sup>24</sup> See also *Schofield v. Penn. S. V. R. R. Co.*, 12 Pa. Co. Ct. 122; *Pittsburgh etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 159 Pa. St. 331, 28 Atl. Rep. 155; *Rudolph v. Penn. S. V. R. R. Co.*, 166 Pa. St. 430, 31 Atl. Rep. 131.

<sup>25</sup> *New Central Coal Co. v. Georges Creek Coal and Iron Co.*, 37 Md. 537; *Brown v. Covey*, 43 Pa. St. 495.

be for public use.<sup>26</sup> A general statute of West Virginia authorizes the condemnation of a right of way under or over the surface from any timber, coal or mineral lands for the purpose of development or of conveying the product of such lands to market, provided the court, to which application is made, "is of the opinion that the purpose for which the property is to be taken is of public utility."<sup>27</sup> In a case arising under the statute the court held that the words public utility, in the statute, meant the same as public use in the constitution, and that, in the particular case, the purpose did not appear to be a public one, but do not pass generally upon the statute.<sup>28</sup> A statute of Iowa permits the owner or lessee of lands having coal, stone or mineral thereon to condemn land for a "public way" to any highway or railroad, such owner or lessee to pay all damages and to construct and maintain the road. The act made no provision for the expenditure of public moneys thereon, and did not in any way define the rights of the public therein. The Supreme Court of that State held that the statute intended that the way should be for the use of the public, and so sustained the act. The court say: "We ought not to declare any act of the legislature void, if a construction can fairly be put upon it under which it can be sustained. In the title, as well as in the body of the act, the ways for the establishment of which it provides are described as public ways, and the legislature must be presumed to have intended that they should be public ways, in the ordinary sense in which that term is used; that is, that the public should have the right to use, occupy and enjoy them as ways or roads. It is not material that the rights and privileges of the public with reference to them are not specially defined in the act, for the rights and privileges of the people generally with reference to public highways are defined in the general statutes on the subject. Neither is it material that no special provision is made

<sup>26</sup> Dietrich v. Murdock, 42 Mo. 279.

<sup>27</sup> Rev. Stats. c. 171, §§ 50, 51.

<sup>28</sup> Salt Co. v. Brown, 7 W. Va.

191. Compare Pittsburgh etc. R. Co. v. Benwood Iron Works, 31 W. Va. 71, 8 S. E. Rep. 453.

in the act for the improvement of such ways, or for putting them in condition for public use at public cost. The authority for making such improvements could probably be found in the general statutes which govern the subject, if there should be occasion for its exercise. And we think that it makes no difference that the mine-owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small."<sup>29</sup> A similar statute of New Jersey has been sustained by the courts of that State, though it differs from the Iowa statute, in that it expressly requires the road to carry freight for any one who has occasion to use it.<sup>30</sup> The laying out of an underground railroad under this statute, about two-thirds of a mile long from a coal mine to a railroad, was sustained.

In Illinois it has been held that a railroad company cannot condemn land for a spur about three-quarters of a mile to a brick-yard, and that such a road was neither authorized by the statute nor the constitution.<sup>31</sup> Also that a railroad from a coal mine to a railroad was not a public purpose for which land could be taken.<sup>32</sup> A switch or spur track built by private parties, to connect a railroad with a mill, factory or quarry is a private use,<sup>33</sup> and a switch or spur built by a railroad company to a single mill or factory and really designed for the accommodation of such

<sup>29</sup> Phillips v. Watson, 63 Ia. 28.

<sup>30</sup> DeCamp v. Hibernia Underground R. R. Co., 47 N. J. L. 43, affirmed by the Court of Errors, 47 N. J. L. 518.

<sup>31</sup> Chicago & Eastern Ill. R. R. Co. v. Wiltse, 116 Ill. 449.

<sup>32</sup> Sholl v. German Coal Co., 118 Ill. 427. See also Koelle v. Knecht, 99 Ill. 396.

<sup>33</sup> Gustafson v. Hamm, 56 Minn. 334, 57 N. W. Rep. 1054; Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. Rep. 553; Green v. Portland, 32 Me. 431.

mill or factory, is generally held to be a private use.<sup>34</sup> But where the switch or spur reaches and accommodates a number of mills, quarries or other establishments, it is held a public use.<sup>35</sup> Railroads connecting mines, mills, etc., with lines of transportation may be authorized by the constitution.<sup>36</sup>

There appears to be no reason why lateral roads should not be constructed, if they are required to serve the public, as occasion requires. The system of so-called private and lateral roads appears to have had its fullest development in Pennsylvania, and a summary of the legislation and decisions on that subject will be found in the case of Waddell's Appeal, 84 Pa. S. 90.<sup>37</sup>

§ 172. Other means of transportation and communication: the telegraph, petroleum tubes, elevated tramways, etc.—A telegraph or telephone line designed for the service of the public and subject to regulation by the legislature is a public use for which property may be taken.<sup>38</sup> The same is true of lines of tubing for the conveyance of petroleum, the same being for general use and subject to public regulation.<sup>39</sup> And so, generally, any means of con-

<sup>34</sup> *Pittsburg etc. R. R. Co. v. Benwood Iron Works*, 31 W. Va. 71, 8 S. E. Rep. 453; *Kyle v. Texas & N. O. R. R. Co.*, 3 Tex. Civ. App. p. 518, § 436.

<sup>35</sup> *Farnsworth v. Lime Rock R. R. Co.*, 83 Me. 440, 22 Atl. Rep. 373; *Kettle River R. R. Co. v. Eastern R. R. Co.*, 41 Minn. 461, 43 N. W. Rep. 469; *Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co.*, 72 Mich. 206, 40 N. W. Rep. 436.

<sup>36</sup> *Ex parte Bacot*, 36 S. C. 125, 15 S. E. Rep. 204. And see *People v. District Court*, 11 Col. 147.

<sup>37</sup> See generally, in addition to cases cited in this section, *St. Louis etc. R. R. Co. v. Petty*, 77 Ark. 359, 21 S. W. Rep. 884;

*Butte etc. R. R. Co. v. Montana U. R. R. Co.*, 16 Mon. 504, 41 Pac. Rep. 232; *State v. Railway Co.*, 40 Ohio St. 504; *Weidenfeld v. Sugar Run R. R. Co.*, 48 Fed. Rep. 615; *Denver etc. R. R. Co. v. Union Pac. R. R. Co.*, 34 Fed. Rep. 386; *Colorado Eastern R. R. Co. v. Union Pac. R. R. Co.*, 41 Fed. Rep. 293.

<sup>38</sup> *Turnpike Co. v. American etc. News Co.*, 43 N. J. L. 381; *Pierce v. Drew*, 136 Mass. 75; *New Orleans etc. R. R. Co. v. Southern & Atlantic Tel. Co.*, 53 Ala. 211; *Mobile etc. R. R. Co. v. Postal Tel. Cable Co.*, 129 Ala. 21; *State v. St. Louis*, 145 Mo. 551, 46 S. W. Rep. 981.

<sup>39</sup> *West Va. Trans. Co. v. Vol-*

veying passengers or goods, or of transmitting intelligence, which is at the service of the public generally, would be a public use for which property might be condemned.<sup>40</sup> A statute of New York authorized the formation of companies to construct elevated tramways for carrying material in buckets and conferred upon them the power of eminent domain. The stockholders of the Solvay Process Company organized a corporation under this act and constructed a road four miles long, between the works of said company and Onondaga lake. There was no public access to its termini and all its capacity was required by the Solvay Process Company. In a proceeding to condemn additional land for terminal facilities, it was held not to be for a public use.<sup>41</sup> A statute of Oregon authorized any company organized to transport timber, lumber or cordwood to construct railroad skidways, tramways, chutes and flumes, and to condemn land therefor and declared that the work should "be deemed to be for the public benefit," and that the owners should "afford to all persons equal facilities in the use thereof for the purposes to which they are adapted upon payment or tender of reasonable compensation, for such use." On a petition to condemn for a skidway under this statute it appeared that the petitioner was organized in the interest of a lumbering company, that the termini of the way were on the land of this company, and that there was no access to the way except over private property. It was held to be for private use.<sup>42</sup>

§ 172a. Public grain elevators.—An act of Minnesota providing for the erection of public grain warehouses and grain elevators on or near the right of way of railways and authorizing the condemnation of sites therefor, was

canic Coal & Oil Co., 5 W. Va. 382.

<sup>40</sup> Concord R. R. Co. v. Greeley, 17 N. H. 47, 61.

<sup>41</sup> Matter of Split Rock Cable R. R. Co., 128 N. Y. 408, 28 N. E. Rep. 506. The court says that

"a possible limited use by a few,

and not then as a right but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner."

<sup>42</sup> Apex Transportation Co. v. Garbade, 32 Or. 532.

held valid on the ground that the taking was for a public use.<sup>43</sup>

§ 173. Urban improvements: sewers, water, gas, etc.—The condemnation of property for public sewers,<sup>44</sup> or works for the disposition of sewerage,<sup>45</sup> for supplying a city or town with water,<sup>46</sup> or gas,<sup>47</sup> is so manifestly for public use that it has been seldom questioned and never denied. So supplying a city and its inhabitants with natural gas is a public use.<sup>48</sup>

§ 174. Public buildings: schools, markets, hospitals, etc.—Property taken for public buildings of all kinds, such as city halls,<sup>49</sup> court houses,<sup>50</sup> jails, public schools,<sup>51</sup> markets,<sup>52</sup> almshouses,<sup>53</sup> and the like, is taken for public use.

<sup>43</sup> *Stewart v. Great Northern R. R. Co.*, 65 Minn. 515, 68 N. W. Rep. 208.

<sup>44</sup> *Hildreth v. Lowell*, 11 Gray 345; *McDaniel v. City of Columbus*, 91 Ga. 462, 17 S. E. Rep. 1011.

<sup>45</sup> *Kingman et al., petitioners*, 153 Mass. 566, 27 N. E. Rep. 778.

<sup>46</sup> *St. Helena Water Co. v. Forbes*, 62 Cal. 182; *Thorn v. Sweeney*, 12 Nev. 251; *Lombard v. Stearns*, 4 Cush. 60; *State v. Eau Claire*, 40 Wis. 533; *Cummings v. Peters*, 56 Cal. 593; *Kane v. Mayor etc. of Baltimore*, 15 Md. 240; *Reddall v. Bryan*, 14 Md. 444; *Wayland v. County Commissioners*, 4 Gray 500; *Burden v. Stein*, 27 Ala. 104, 116; *Riche v. Bar Harbor Water Co.*, 75 Me. 91; *Olmstead v. Proprietors of the Morris Aqueduct Co.*, 46 N. J. L. 495, affirmed by Court of Errors, 47 N. J. L. 311; *Stamford Water Co. v. Stanley*, 39 Hun 424; *Matter of New Rochelle Water Co.*, 46 Hun 525; *Pocantico Water Works Co. v.*

*Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Witcher v. Holland W. Co.*, 66 Hun 619, 20 N. Y. St. 560.

<sup>47</sup> *Bloomfield etc. Natural Gas Light Co. v. Richardson*, 63 Barb. 437.

<sup>48</sup> *State v. City of Toledo*, 48 Ohio St. 112, 26 N. E. Rep. 1061.

<sup>49</sup> *Cincinnati etc. R. R. Co. v. Village of Belle Centre*, 48 Ohio St. 273, 27 N. E. Rep. 464.

<sup>50</sup> *Jockheck v. Board of Comrs.*, 53 Kan. 780, 37 Pac. Rep. 621.

<sup>51</sup> *Chamberlin v. Morgan*, 68 Pa. St. 168; *Williams v. School District*, 33 Vt. 271; *Long v. Fuller*, 68 Pa. St. 170; *Township Board v. Hackman*, 48 Mo. 243; *Rittenhouse v. Creasy*, 2 Luzerne Leg. Reg. Rep. (Pa.) 211.

<sup>52</sup> *Matter of Application of Cooper*, 28 Hun 515. But see *Twelfth St. Market Co. v. Philadelphia etc. R. R. Co.*, 142 Pa. St. 580, 21 Atl. Rep. 989.

<sup>53</sup> *Hayward v. Mayor etc. of New York*, 8 Barb. 486.

This right has been questioned in some decisions, but never denied in any decided case.<sup>54</sup> So a postoffice and custom house<sup>55</sup> and other public works for the general government are a public use for which the State's power of eminent domain may be exercised.<sup>56</sup>

§ 175. **Public parks and pleasure drives.**—Pleasure and recreation are not only essential to health, but tend to the improvement of character. No better instance of a public use can be given than that of a public square or park in the midst of, or convenient to, a dense population. Private property may be taken for the purpose of securing such means of recreation and health.<sup>57</sup> A park is a public use, though not located in a city or town, but only in the vicinity of it.<sup>58</sup> Land may be taken on each side of a highway to be kept open for court yards and ornament.<sup>59</sup> Highways may be laid out for the purpose of affording access to a position which commands a fine view or for accom-

<sup>54</sup> Justice Woodbury in *West River Bridge Co. v. Dix*, 6 How. p. 546, says: "Who ever heard of laws to condemn private property for public use, for a marine hospital or State prison? So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence." For comments on this language see 33 *Vt.* 278, 279.

<sup>55</sup> *Burt v. Merchants' Ins. Co.*, 106 *Mass.* 356.

<sup>56</sup> See post, § 203.

<sup>57</sup> *Brooklyn Park Co. v. Armstrong*, 45 *N. Y.* 234; *Matter of Commissioners for Central Park*, 63 *Barb.* 282; *Owners of Ground v. Mayor etc. of Albany*, 15 *Wend.* 374; *County Court v. Griswold*, 58 *Mo.* 175; *United States v. Cooper*, 9 *Mackey* 104; *Shoemaker v. United States*, 147 *U. S.* 282, 13 *S. C. Rep.* 361. See also the following cases which impliedly sustain the same proposition: *Holt v. Somerville*, 127 *Mass.* 408; *Foster v. Boston Park Comrs.*, 131 *Mass.* 225; *S. C.* 133 *Mass.* 321; *Cook v. South Park Comrs.*, 61 *Ill.* 115; *Kerr v. South Park Comrs.*, 117 *U. S.* 379; *Winn v. Board of Park Comrs.*, (*Ky.*) 14 *S. W. Rep.* 421.

<sup>58</sup> *County Court v. Griswold*, 58 *Mo.* 175.

<sup>59</sup> *Matter Bushwick Avenue*, 48 *Barb.* 9.



modating pleasure driving.<sup>60</sup> The taking of a large tract in the Adirondacks for a State park was held to be for a public use.<sup>61</sup> So limiting the height of buildings around a public park or square.<sup>62</sup>

§ 175a. Converting spots of historic interest into public grounds: battle fields.—Acts of Congress provided for the condemnation of land “for the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for the opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations, with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure.” This was held to be within the powers vested in Congress and a public use for which the power of eminent domain could be exercised.<sup>63</sup>

<sup>60</sup> *Higginson v. Nahant*, 11 Allen, 530; *Mount Washington Road Co.*, 35 N. H. 134; see *Woodstock v. Gallup*, 28 Vt. 537; *Bryan v. Branford*, 50 Conn. 246; ante, § 166.

<sup>61</sup> *People v. Adirondack R. R. Co.*, 160 N. Y. 225; reversing S. C. 39 App. Div. 34.

<sup>62</sup> *Attorney General v. Williams*, (Mass.) 55 N. E. Rep. 77.

<sup>63</sup> *United States v. Gettysburg Electric R. R. Co.*, 160 U. S. 688, 16 S. C. Rep. 427, reversing S. C. 67 Fed. Rep. 869. The court says: “The end to be attained, by this proposed use, as provided for by the act of congress, is legitimate, and lies within the scope of the constitution. The battle of Get-

tsburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery, and, indeed, heroism, displayed by both the contending forces, rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself, and the perpetuity of our institutions, depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield, in connection

§ 176. **Cemeteries.**—Public places of sepulture are undoubtedly a public use, and the power of eminent domain may be exercised for this purpose, when the cemetery is to

with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in

congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country, the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property, ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with, and springs from, the same powers of the constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored. No narrow view of the character of

be under the control of public authorities, or when the right of sepulture is public and general.<sup>64</sup> But cemetery associations cannot condemn land for burial purposes, to be vested in the association and lot-holders as their private property, and in which the public have no rights.<sup>65</sup> It is no objection that the privilege must be paid for, nor that the price varies according to location, nor that the price operates as a practical exclusion of a portion of the public.<sup>66</sup>

§ 177. *Improvement of navigation.*—As we have already seen, all navigable streams are public highways by water, and the public not only have a right to traverse them, but to improve them for that purpose, and private property may be condemned in order to effect such improvements.<sup>67</sup> Any occupation or interference with private property for the purpose of improving navigation, as by the construction

this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred. It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended, as set forth in the petition in this proceeding, is of that public nature which comes within the constitutional power of congress to provide for by the condemnation of land." See *United States v. Tract of Land*, 70 Fed. Rep. 940.

<sup>64</sup> *Edgecumbe v. Burlington*, 46 Vt. 218; *Balch v. County Comrs. of Essex*, 103 Mass. 106; *Edwards v. Stonington Cemetery Association*, 20 Conn. 466. In all

these cases the proceedings were for the enlargement of an existing cemetery. Also, *Evergreen Cemetery Association v. New Haven*, 43 Conn. 234, 241; *Forne-man v. Mt. Pleasant Cem. Assn.*, 135 Ind. 344, 35 N. E. Rep. 271; *Standards Corners Rural Cem. Assn. v. Brandes*, 35 N. Y. Supp. 1015; *United States v. Gettysburg Electric R. R. Co.*, 160 U. S. 688, 16 S. C. Rep. 427; *West-field Cem. Assn. v. Danielson*, 62 Conn. 319, 26 Atl. Rep. 345.

<sup>65</sup> *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. Rep. 894; *Fork Ridge Bapt.st Cem. Assn. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405; *Matter of Deansville Cemetery Association*, 46 N. Y. 569; *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551.

<sup>66</sup> *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551.

<sup>67</sup> *Matter of Petition of United States*, 96 N. Y. 227; S. C. 67 How. Pr. 121.

of canals or dams is for public use.<sup>68</sup> A boom to facilitate the running, storing and handling of logs is an improvement of such highway and a public use.<sup>69</sup> Land may be taken on the banks of navigable streams for public landing places, including yard room for storing and handling freight.<sup>70</sup> The establishment of harbor lines and improvement of harbors fall in the same category.<sup>71</sup> A company was chartered by the legislature of Tennessee for the purpose of constructing sheds, railroads, engines and other equipments to be used in loading and unloading freight on or from steamboats and other craft touching at Memphis. This was held not to be a public use which would authorize the condemnation of private property. The ground of this decision was that it was a public convenience, merely, and not a necessity, and that it was not subject to public regulation in its charges and services.<sup>72</sup> Converting a private stream into a highway for floating logs and timber is a public use for which riparian rights may be condemned.<sup>73</sup>

§ 178. **Water mills and water power.**—Prior to the Revolution, and, consequently, long before the courts of this country were called upon to adjudicate upon the question of public use, it had been the practice to permit the erection of dams for water power and to provide for a statutory adjustment of the damages to property overflowed.<sup>74</sup> After the Revolution and the adoption of State constitutions con-

<sup>68</sup> *Hazen v. Essex Co.*, 12 Cush. 475; *Calking v. Baldwin*, 4 Wend. 667.

<sup>69</sup> *Cotton v. Miss. & Rum River Boom Co.*, 22 Minn. 372; *Patterson v. Boom Co.*, 3 Dill. 465; S. C. affirmed, 98 U. S. 403.

<sup>70</sup> *Pearson v. Johnson*, 54 Miss. 259; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 10 Mo. App. 401; *Pittsburgh v. Scott*, 1 Pa. St. 309.

<sup>71</sup> *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561; *Moore v. Sanford*, 151 Mass. 285, 24 N. E. Rep. 323.

<sup>72</sup> *Memphis Freight Co. v. Memphis*, 4 Cold. 419.

<sup>73</sup> *Martin v. Burns*, 155 N. Y. 23.

<sup>74</sup> Acts of 8 Anne, 1714, and 13 Anne, 1719, in Colony of Massachusetts Bay, Ancient Charters, pp. 388, 404; and see remarks of court in *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467-9, and *Murdock v. Stickney*, 8 Cush. 113, 117. In *Great Falls Manf. Co. v. Fernald*, 47 N. H. 444, 459, such acts are said to have been in force in that State since 1718.

taining the eminent domain provision in question, this practice continued, no question being made for some time as to the constitutionality of such proceedings.<sup>75</sup> When at last the question was raised as to the public use of these mills, the practice had been so long acquiesced in and encouraged and so much capital had become invested in such enterprises, that the courts were hardly in a condition to give the question a fair consideration. Courts are not, and perhaps ought not to be, free from the influence of the circumstances which surround a case and the consequences which may flow from a particular decision. Most of the mills which existed in these early years were grist-mills and saw-mills, accustomed to grind and saw for the public, and dependent upon the custom of the public for their success and profit. In most States they were regulated by law and compelled to serve the public for a stipulated toll and in regular order.<sup>76</sup>

<sup>75</sup> *Stowell v. Flagg*, 11 Mass. 364, 1814; *Cogswell v. Essex Mill Corp.*, 6 Pick. 94, 1827; *Wolcott v. Woolen Manf. Co.*, 5 Pick. 292, 1824; *Fiske v. Framingham Manf. Co.*, 12 Pick. 67, 1831; *French v. Braintree Manf. Co.*, 23 Pick. 216, 1839; *Crenshaw v. Slate River Co.*, 6 Rand. Va. 245, 1828; *Bibb v. Mountjoy*, 2 Bibb 1, 1810; *Afee v. Kennedy*, 1 Litt. 92, 1822; *Smith v. Connelly's Heirs*, 1 T. B. Mon. 58, 1824; *Shackleford v. Coffee*, 4 J. J. Marsh 40, 1830.

<sup>76</sup> We have not access to all the old statutes of the different States enacted prior to the time when the constitutionality of the mill acts was called in question, but give below sufficient to sustain the text.

Alabama. All mills were declared to be for public use, and were required to be commenced within one and completed within

three years after leave granted. Grist mills were required to grind according to turn and well and sufficiently all grain brought thereto and for a toll fixed by the county court where located. Acts of 1811 and 1812. The act of 1812 authorized the erection of grist-mills, saw-mills, cotton gins or other useful water works. *Tomlin's Digest, Laws of Ala.*, pp. 623-626.

Connecticut. The first act authorizing flowage by dams appears to have been passed in 1864. Acts of 1864, p. 40. There had existed, however, since 1796 a statute regulating the tolls and duties of millers. Acts and Laws, 1796.

Delaware. As far back as 1752 an act was passed for regulating the tolls of millers, and from time to time during the remainder of the century acts were passed compelling millers to

§ 179. **The same: Leading cases.**—The question as to the constitutionality of these mill acts appears to have been

grind for the public, to keep their mills in repair, and otherwise regulating them. Laws of Del. 1829, pp. 402, 403. Laws of Del. 1797, *passim*.

Georgia had a similar act passed in 1786. Prince's Digest of Laws of Ga. p. 339.

Kentucky. In 1797 an act was passed for the erection of water grist-mills. Applicants were obliged to commence their mill in one year and complete it in three years and keep it in repair under a penalty. Millers were required to grind well and sufficiently the grain brought to their mills in due time as the same was brought. In 1810 the provisions of this act were extended to "any kind of water works." Littell & Swigert Digest of Laws of Ky., 1822, pp. 935-939.

Maryland. Acts of 1704 and 1816 regulate tolls for grinding. Dorsey's Statutes, vol. 1, pp. 3 and 640. No act for a statutory assessment of damages appears to have existed up to 1840.

Massachusetts. The first act for a statutory assessment of damages from flowage was passed in 1714. Ancient Charters, p. 404. The preamble refers to mills as "serviceable for the publick good and benefit of the town, or considerable neighborhood in or near to which they have been erected." Which indicates that saw-mills and grist-mills for public use were in mind. The act, however, provides for "any water-mill or mills." Other early acts regulate

the tolls and duties of millers. Act of 1635, Ancient Charters, p. 157; also pp. 338, 469. The act of 1796 was a revision of the statutes on this subject. Perpetual Laws, vol. 2, p. 344. The act applies to "any water mill." The preamble recites as follows: "Whereas the erection and support of mills to accommodate the inhabitants of the several parts of the State ought not to be discouraged by many doubts and disputes," etc. This shows that the legislature had in mind public mills. The act also regulates the tolls and prescribes the duties of millers. There were afterwards many additions and amendments to this act and also many special acts passed for the erection of particular mills or water power.

New Hampshire. In 1718 an act was passed authorizing the erection of water mills and providing a statutory remedy for flowage. The act regulates the toll of millers. The act is given in full, together with a summary of legislation on the subject, in 44 N. H. 448-450.

New Jersey. An act of 1696 prescribes the tolls of millers. Leaming & Spicer's Grants etc. of N. J. 547. Similar regulations were continued in force until the present century. Nixon's Digest of Laws, p. 547; Rev. Stat. 1821, p. 446. I find no laws for the erection of mills or the assessment of damages to lands.

North Carolina. An act of 1777 allows the erection of wa-

made almost simultaneously in two different States, Massachusetts and New Jersey.<sup>77</sup> In *Boston & Roxbury Mill Corporation v. Newman*, the plaintiff was authorized to construct a system of dams and works for the purpose of operating grist-mills, iron manufactories and other mills

ter grist-mills only, and provides for an assessment of damages caused by flowage. All millers are required to grind "according to turn," and "well and sufficiently," for a prescribed toll. After the right has been acquired, the applicant must commence his works within a year and complete them within three years. This act continued in force at least until 1821. *Rev. Stat. 1821, vol. 1, p. 345.*

Pennsylvania. Mill acts do not appear to have existed in this State in early times. An act of 1803 permits the erection of dams in all but specified streams, but the persons erecting such dams are not to "infringe on or injure the rights or privileges of the owner or possessor of any private property on said stream." *Purdon's Statutes, p. 592.*

Rhode Island. An act of 1726 regulates the tolls of millers. *Rev. Stat. 1822, p. 376.* An act of 1734 provides for the erection of "water mills" and an assessment of damages from flowage. *Same, p. 374.*

South Carolina. In 1712 an act was passed offering a benefit to the one who should first erect and put in successful operation a wind or water saw-mill, or a wind or water grist-mill. *Statutes at Large, vol. 2, p. 388.* In 1744 an act was passed which prohibited the erection or main-

tenance of dams which flooded the lands of others and provided for their abatement. *Ibid. vol. 3, p. 609.* This act, at first passed for three years only, was revived and made perpetual in 1783. *Ibid. vol. 4, p. 540.* In 1785 an act was passed regulating tolls taken by millers. *Ibid. vol. 4, p. 652.*

Virginia. Various acts were passed from 1645 to 1666 regulating the charges and duties of millers. *Henning's Stat. at Large, vol. 1, pp. 301, 348, 485; vol. 2, p. 242.* In 1667 an act was passed allowing the owner on one side of a stream to condemn an acre of land on the opposite side for the purpose of erecting a mill "for the grinding of corn." *Ibid. vol. 2, p. 260.* In 1745 the first act was passed, allowing an assessment of damages for flowage. *Ibid. vol. 5, p. 360.* This act applied generally to water mills. In 1748 these various acts were revised and continued in force at least until after the adoption of the first constitution. *Ibid. vol. 6, p. 55.*

Vermont. An act of 1797 regulates the tolls and duties of millers. *Rev. Laws, 1797, p. 407.* No flowage laws existed until a recent date.

<sup>77</sup> *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467, 476, 1832; *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694, 1832.

by means of tide water. The act was held valid principally on the ground that the establishment of such mills would be a great public benefit. The acts of the Colony and State in reference to mills were referred to as showing the light in which the legislature and the people had regarded such works. The court say: "We should be at a loss to imagine any undertaking of an individual or association of persons with a view to private emolument, in which the public had a more certain and direct interest and benefit." "Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? 'But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll.' If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes?"

In *Scudder v. Trenton Del. Falls Co.*<sup>78</sup> the decision was by the Chancellor only. He says: "May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking? The water power about to be created, will be sufficient for the erection of seventy mills, and factories, and other works dependent on such power. It will be located at the seat of government, at the head of tide water, and in a flourishing and populous district of country. It will be no experiment in a country like ours; and, judging from the results in other places, we may make a sufficiently accurate calculation as to the result here. Take the town of Paterson as an example. The water power there is in the hands of individuals—a company like this. They are under no obligation to lease or sell any mills or privileges to the public; and yet see the result of a few years' operation.

<sup>78</sup> 1 N. J. Eq. 694, 728.



Paterson is now the manufacturing emporium of the State, with a population of eight thousand souls. It has increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind. May we not hope that a similar benefit may be experienced here? \* \* \* The ever-varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being. The great principle remains: There must be a public use or benefit; that is indisputable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule. Looking at this case in all its bearings, and believing as I do that great benefit will result to the community from the contemplated improvement, I am not satisfied to declare the act of incorporation, or that part of it which is now in question, void and unconstitutional." The act was accordingly sustained.

In the same year a case was decided in Tennessee which intimates that to take land for a saw-mill or paper-mill or any kind of mill except a public grist-mill would not be a taking for a public use.<sup>79</sup> The decision in the case was that, under an act which related solely to grist-mills, an application for a grist-mill, saw-mill and paper-mill could not be granted. These early cases were not very carefully considered, but they were sufficient to establish the law of the States where they were made, and to exert an important influence upon the law of sister States.

§ 180. The same: Law in the different States at the present time.—The taking of land for water-power for running any kind of mills or machinery is held to be for public use upon principle in Connecticut,<sup>80</sup> Indiana,<sup>81</sup> Massachusetts,<sup>82</sup>

<sup>79</sup> *Harding v. Goodlet*, 3 Yerg. Tenn. 41, 1832.

<sup>80</sup> *Olmstead v. Camp*, 33 Conn. 532, 551; *Todd v. Austin*, 34

Conn. 78, 90; *Occum Co. v. Sprague Manf. Co.*, 35 Conn. 496. In *Olmstead v. Camp* the court say: "It would be difficult to

New Hampshire;<sup>83</sup> and New Jersey;<sup>84</sup> and also by the Supreme Court of the United States in a case which went up from New Hampshire.<sup>85</sup> The constitutionality of acts for this purpose has been seriously questioned, but nevertheless upheld either on the ground of authority or long and general acquiescence and usage in Iowa,<sup>86</sup> Kansas,<sup>87</sup>

conceive a greater public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the State." In *Todd v. Austin* this proposition is laid down: "The legislature may lawfully grant rights of easement to individuals or corporations to enable them to erect and operate structures, if the result of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants."

<sup>81</sup> *Hankins v. Lawrence*, 8 Blackf. 266; *Kepley v. Taylor*, 1 Blackf. 492.

<sup>82</sup> *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467; *Hazen v. Essex Co.*, 12 Cush. 475; *Murdock v. Stickney*, 8 Cush. 113. In the latter case the court doubt whether the mill acts could be sustained if the question was a new one, but say it is too late to question them after being in full operation for a century and a half. In this case also the court take the position that the mill acts are not

an exercise of the power of eminent domain at all, but the argument is too obscure to be condensed. An interesting commentary upon the mill acts, in which the position taken in 8 Cush. is elaborated, will be found in *Lowell v. Boston*, 111 Mass. 454. A statement of this case will be found in § 182, post. In *Turner v. Nye*, 154 Mass. 579, 28 N. E. Rep. 1048, doubt is again expressed whether the mill acts could be sustained as new legislation. See opinion of the court, p. 582.

<sup>83</sup> *Great Falls Manf. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Manf. Co. v. Head*, 56 N. H. 386; *Ash v. Cummings*, 50 N. H. 591; *Amoskeag Manf. Co. v. Worcester*, 60 N. H. 522; *Amoskeag Manf. Co. v. Goodale*, 62 N. H. 66.

<sup>84</sup> *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694.

<sup>85</sup> *Head v. Amoskeag Manf. Co.*, 113 U. S. 9.

<sup>86</sup> *Burnham v. Thompson*, 35 Ia. 421; *Gammell v. Potter*, 6 Ia. 548. In *Fleming v. Hull*, 73 Ia. 598, 35 N. W. Rep. 673, doubt is expressed whether, if the question was now (1887) to come up for the first time the mill acts would not be held unconstitutional.

<sup>87</sup> *Venard v. Cross*, 8 Kan. 248; *Harding v. Funk*, 8 Kan. 315, 323.

Maine,<sup>88</sup> Minnesota,<sup>89</sup> Nebraska,<sup>90</sup> and Wisconsin.<sup>91</sup> On

In the former case it is argued that, when the constitution was adopted, mill acts had been in operation in other States, and if the people had intended to stop the practice they would have said so in express terms. One judge dissents on principle, but acquiesces in the decision for the reason above stated. It is doubtful whether these cases sustain anything more than public grist-mills. In *Harding v. Funk* the court say: "The fact, however, is that the mills provided for under our statute, are neither absolutely private mills nor absolutely public mills, but they partake of the character of both. They might perhaps properly be called quasi public mills. It is not necessary for us to say what would be our decision upon this question if the same was a new question in this country. But it is not a new question. It has been long and well settled by legislative, executive, and judicial construction, practice, and usage; and we are not now at liberty to depart from such construction, practice, and usage." See also *Rev. Stat. 1860*, chaps. 65 and 66.

<sup>88</sup> *Jordan v. Woodward*, 40 Me. 317, 323. "The mill act, as it has existed in this State, pushes the power of eminent domain to the verge of constitutional inhibition." "Strictly speaking, private property can only be said to have been taken for public use when it has been so appropriated that the public have certain well-defined rights

to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use."

<sup>89</sup> *Miller v. Troost*, 14 Minn. 365, 369. "Had not similar laws, in States having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one. The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional." In *Coates v. Campbell*, 37 Minn. 498, 35 N. W. Rep. 366, an act authorizing a city to issue bonds to aid in the construction of a dam for improving a private water power was held to be void, because the object was not a public purpose for which taxes could be levied.

<sup>90</sup> *Traver v. Merrick County*, 14 Neb. 327.

<sup>91</sup> *Newcomb v. Smith*, 1 Chandler, 71, 1849. In this case two of the five judges dissent in an elaborate opinion. In *Thien v. Voegtlander*, 3 Wis. 461, the decision in *Newcomb v. Smith* is impliedly questioned, while in *Pratt v. Brown*, 3 Wis. 603, the minority opinion is commended, but the court do not deem it necessary to reconsider the question, because the act in question had in the meantime been repealed. Other acts were

the other hand, such acts have been held to be unconstitutional as authorizing the taking of private property for private use, except in case of public mills, in the States of Alabama,<sup>92</sup> Georgia,<sup>93</sup> Michigan,<sup>94</sup> New York,<sup>95</sup> Vermont,<sup>96</sup> and West Virginia.<sup>97</sup>

§ 181. The same: Review of the decisions.—Saw-mills and grist-mills, carding and fulling-mills, cotton gins and other mills, which are regulated by law and obliged to serve the public, are undoubtedly a public use.<sup>1</sup> But, as

sustained in *Babb v. Mackey*, 10 Wis. 371; *Fisher v. Horicon Iron & Manf. Co.*, 10 Wis. 351, though in the latter case the court distinctly say that they would hold the mill act unconstitutional, but for the large investments which had been made upon the faith in the decision in *Newcomb v. Smith*. In *Attorney General v. Eau Claire*, 37 Wis. 400, 436, the court say: "This court, as now organized, has, in submission to the rule stare decisis, reluctantly, against its own views, followed *Newcomb v. Smith*, 1 Chand. 71, in upholding the mill-dam act." See also *Bowers v. Bears*, 12 Wis. 213, 221, and *McCord v. Sylvester*, 32 Wis. 451.

<sup>92</sup> *Sadler v. Langham*, 34 Ala. 311; *Bottoms v. Brewer*, 54 Ala. 288. In the former case it is said that long acquiescence in such acts is no reason for sustaining them. By the code in force in 1891 the power of eminent domain may be exercised for the establishment of a dam "for any water grist-mill, saw-mill, gin, or factory, to be operated for the public." In a proceeding under the statute it is held a fatal defect if the petition fails to show

that the proposed mill is to be operated for the public. *McCulley v. Cunningham*, 96 Ala. 583, 11 So. Rep. 694.

<sup>93</sup> *Loughbridge v. Harris*, 42 Ga. 501. Here it is denied that even grist-mills are a public use.

<sup>94</sup> *Ryerson v. Brown*, 35 Mich. 333; overruling *Hartwell's Petition*, 2 Nisi Prius Rep. 97, 1871. In this case (*Ryerson v. Brown*), Judge Cooley, in an elaborate opinion, reviews the authorities and discusses the principles applicable to the question under consideration.

<sup>95</sup> See dictum in *Hay v. Cohoes Co.*, 3 Barb. 42.

<sup>96</sup> *Tyler v. Beacher*, 44 Vt. 648. This also is an instructive and well-considered case. In *re Barre Water Co.*, 62 Vt. 27, 20 Atl. Rep. 109, 3 Am. R. R. & Corp. Rep. 136.

<sup>97</sup> *Varner v. Martin*, 21 W. Va. 534. This case contains an elaborate opinion which discusses the question, but the decision is not directly in point. In *Oregon* land may be condemned for a flume to convey water to lumber mills. *Maffet v. Quine*, 93 Fed. Rep. 347.

<sup>1</sup> *Harding v. Goodlett*, 3 Yerg.

respects all other kinds of mills, although they may be a public benefit, they are not a public use within the meaning of the constitution. No one of the public has any right in these mills. No one of the public can require any service at their hands. They are as absolutely private property and for private use as a steam-mill or a business block.<sup>2</sup> In the original States it is almost certain that, at the time of the adoption of the first constitutions—that is, from 1777 to 1800—the power of eminent domain had never been exercised for the establishment of any mills except such as were public, either by law or practice. These acts were prompted by the great and urgent necessity which existed in the early history of the country for mills for grinding grain and sawing logs. It was undoubtedly the understanding of the legislature and people that the mill acts had reference to mills of this character. The fact, therefore, that no reference is made to mills or mill acts in the early constitutions cannot be construed into a recognition of all kinds of water mills as a public use.

It must be confessed, however, that many courts which have been called upon to pass upon the validity of these acts for the first time have labored under peculiar difficulties. The question has not generally arisen in any State until a large amount of capital had become invested upon the assumption of their validity. To have declared them unconstitutional, it was supposed, would have been to jeopardize these investments, and bring loss and ruin to many citizens. The legislatures and people of the newer States were justified in accepting the construction given by the courts of the older States to a constitutional provision which the newer States had adopted from the older ones. These decisions were the best attainable information. The first case holding the acts in question unconstitutional was not decided until 1859, and until then no

41; Varner v. Martin, 21 W. Va. 534; Sadler v. Langham, 34 Ala. 311; McCulley v. Cunningham, 96 Ala. 583, 11 So. Rep. 694; State v. Edwards, 86 Me. 102, 29 Atl. Rep. 947.  
<sup>2</sup> Cole v. La Grange, 113 U. S. 1.

legislature had reason to suspect their invalidity.<sup>3</sup> When the question first arose in Massachusetts in 1832,<sup>4</sup> the court of that State had very plausible grounds for sustaining the act in question, on the ground of a contemporaneous construction by the legislature and of long acquiescence on the part of the people and legal profession.<sup>5</sup> The New Jersey court, which passed upon the question at the same time,<sup>6</sup> had similar grounds to go upon, and, besides, was free from any embarrassment occasioned by the constitution, since the constitution of that State contained no provision as to taking private property for public use until 1844. When the question next arose in Indiana, in 1846,<sup>7</sup> the court was sustained in its views, not only by contemporaneous construction and long acquiescence, but also by the authority of the decisions in Massachusetts and New Jersey. The next case, which arose in Wisconsin in 1849,<sup>8</sup> presented still stronger inducements to sustain the act. The act there in question was taken largely from the statutes of Massachusetts. The constitutional provision in question had been transplanted from the older States, where it had not only received a practical construction by the legislatures in favor of the mill acts, but had also been construed by the courts in favor of such acts. Moreover, the act in question was in force when the constitution was adopted. Every State which has since been called upon to adjudicate upon this question has labored under similar embarrassments.

But, while these considerations may explain, they do not justify, the decisions which have been made. The doctrine of contemporary construction or long acquiescence will not justify upholding a statute which is plainly repugnant

<sup>3</sup> *Sadler v. Langham*, 34 Ala. 311.

<sup>4</sup> *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467, 1832.

<sup>5</sup> *Cooley*, Const. Lim. pp. 67-72; *Sedgwick Con. Law*. pp. 412, 413.

<sup>6</sup> *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694, 1832.

<sup>7</sup> *Hankings v. Lawrence*, 8 Blackf. 266. In the previous case of *Kepler v. Taylor*, 1 Blackf. 492, the question was not made, though the acts are expressly sanctioned by the court.

<sup>8</sup> *Newcomb v. Smith*, 1 Chand. 71, 1849.

to the constitution.<sup>9</sup> Especially is this true where no material embarrassment will result from an adverse decision. Stress has been laid in many cases upon the fact that a large amount of capital had become invested under the mill acts which would be endangered or swept away if these acts were declared invalid. But this we think is a mistake. Those whose property had been condemned for mills had received the damages awarded and would be estopped from questioning the validity of the proceedings by which it was acquired.<sup>10</sup> This principle would have relieved and still relieves the question of most of its embarrassment. The prosperity of the State would not have been affected by such a decision, for it is not probable that in this age of steam and enterprise there would have been one less mill in consequence.<sup>11</sup>

§ 182. **Massachusetts doctrine that the mill acts do not fall under the eminent domain power.**—A doctrine has grown up in Massachusetts that the mill acts are not an exercise of the power of eminent domain at all, but are referable to the same power, and to be classed with the same acts, that regulate the duties of adjoining proprietors to each other in regard to division fences and party walls, and the enjoyment and partition of joint estates.<sup>12</sup> This doctrine has also lately found its way into the Supreme Court of the United States, through a judge from Massachusetts.<sup>13</sup> The doctrine is very fully elaborated in Lowell

<sup>9</sup> Story on Const. § 407; Cooley, Const. Lim. 70, 71.

<sup>10</sup> Post, § 606.

<sup>11</sup> In *Fleming v. Hull*, 73 Ia. 598, 35 N. W. Rep. 673, it is said: "But if such statutes were enacted now for the first time, it is possible, if not probable, that they could not be sustained."

<sup>12</sup> *Fiske v. Framingham Manf. Co.*, 12 Pick. 68, 70-72; *Williams v. Nelson*, 23 Pick. 141, 143; *French v. Braintree Manf. Co.*, 23 Pick. 216, 218-221; *Cary v.*

*Daniels*, 8 Met. 466, 476, 477; *Murdock v. Stickney*, 8 Cush. 113, 116; *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 552, 553; *Gould v. Boston Dock Co.*, 13 Gray, 442, 450; *Storm v. Manchaug Co.*, 13 Allen, 10; *Lowell v. Boston*, 111 Mass. 454; *Turner v. Nye*, 154 Mass. 579, 23 N. E. Rep. 1048.

<sup>13</sup> *Head v. Amoskeag Manf. Co.*, 113 U. S. 9, opinion by Gray, J. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, the United

v. Boston,<sup>14</sup> from which we make the following quotation:

"The mill acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court, used arguendo, has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare, as to justify the exercise of the right of eminent domain in their behalf, as a public use. *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467; *Hazen v. Essex Co.*, 12 Cush. 475, 478; *Talbot v. Hudson*, 16 Gray, 417, 426.

"That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the

States Court holds that flooding property by means of a dam is a taking. In *Head v. Amoskeag Manf. Co.*, ante, the same court holds that property may be flooded by a dam in order to create a water power to operate the mill of a private manufacturing corporation. In *Cole v. La Grange*, in the same volume, page 1, it holds that neither the power of eminent domain nor of taxation can be exercised for the purpose of aiding a private manufacturing company. We do not see how these three decisions can stand together. If a flooding is a taking, then land can only be flooded for a public use.

If land may be flooded to afford water power for a mill, then it follows that a mill is a public use. But if a mill is a public use for which the power of eminent domain may be exercised, why is it not a public use for which the power of taxation may be exercised? The only reconciliation that can be made of these cases is to limit the opinion in *Head v. Amoskeag Manf. Co.* to the particular point decided, viz.: that the mill acts of New Hampshire were due process of law in that State at the time the Fourteenth Amendment was adopted.

<sup>14</sup> 111 Mass. 454, 464.



Boston & Roxbury Mill Corporation, and the Salem Mill-dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise.

"The advantages to be derived from a running stream by the several riparian proprietors, are of natural right. Each one may make use of its waters, as they flow through his lands, in a reasonable manner, for such purposes as they are adapted to serve. In order that each may have his opportunity in turn, each is entitled to have the water allowed to flow to and from his land as it has been accustomed to flow, with only such modification as results from such reasonable use. Hence, all proprietors upon a stream, from its source to its mouth, have, in a certain sense, a common interest in it, and a common right to the enjoyment of all its capacities. Among those capacities no one is more important than that of the force of the current to supply power for the operation of mills. To make that force practicably servicable requires a considerable head and fall at the point where it is to be applied; often more than can be gained within the limits of one proprietor. The use of the stream in this mode has always been regarded as a reasonable use, notwithstanding the effect of the dam, by which the head is created, to retard the water in its flow to the proprietor below, and to set it back and thus diminish or destroy the force of the current above. One who thus appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the proprietor above. *Hatch v. Dwight*, 17 Mass. 289, 296; *Cary v. Daniels*, 8 Met. 466; *Gould v. Boston Duck Co.*, 13 Gray, 442. But this protection extends no farther than to justify the appropriation of a part of that quality of the stream which, until so appropriated, is common to all. It does not justify any, even the least, injury to land outside the channel. Without some law to control, the mill-owner would be exposed,

not merely to the liability to make just compensation for injuries thus occasioned, but to harassing suits for damages and to abatement of his dam as causing a nuisance. This liability and the inevitable controversies growing out of conflicting rights in the stream itself, tending to defeat all advantageous use of its power, led to the adoption of laws regulating and protecting the beneficial use of streams for mill purposes. The St. of 1795, c. 74, is introduced by the recital: 'Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors.' But there is no public service secured through the mill acts, except so far as it may result incidentally, and as the inducements of private interest may lead mill-owners to devote their mills to purposes favorable to the public accommodation. The same rights and protection are secured to all who may be possessed of sites for mills, whatever the purpose for which their mills may be designed, and however useless for all purposes of public accommodation or advantage. There is no discrimination in this respect, and no provision to secure any public service that may be supposed to have been contemplated. Further than this, each proprietor is allowed to avail himself of the rights secured by the mill acts, in his own mode and for his own purposes, at his own discretion, without the intervention of any public officer or other tribunal or board, to whom such a governmental function as the exercise of the right of eminent domain is ordinarily entrusted, when not under the special direction of the legislature itself.

"A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt v. Whitney*, 4 Met. 603; *Talbot v. Hudson*, 16 Gray, 417, 422,

426. But it is not so. It confers no right in the land upon the mill-owner, and takes none from the land-owner. *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 13 Allen, 10. In *Murdock v. Stickney*, Chief Justice Shaw remarks, in reference to the mill acts: 'The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.' In *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 553, he says: 'It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it.' Similar declarations are made in *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141. 'This regulation of the rights of riparian proprietors, both in respect to the stream and to their adjacent lands, liable to be affected by its use, involves no other governmental power than that 'to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances,' as the general court 'shall adjudge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same.' Const. of Mass. c. 1, § 1, art. iv.

"All individual rights of property are held subject to this power, which alone can adjust their manifold relations and conflicting tendencies. The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests, and in behalf of which it is exercised; whether by restricting the use of private property in a manner prejudicial to the public; *Commonwealth v. Alger*, 7 Cush. 53; or by imposing burdens upon it for the protection or convenience in part of the public; *Goddard, Petitioner*, 16 Pick. 504; *Baker v. Boston*, 12 Pick. 184, 193; *Salem v. Eastern Railroad Co.*, 98 Mass. 431; or by modify-

ing rights of individuals, in respect of their mutual relations, in order to secure their more advantageous enjoyment by each." The court then alludes to various other statutes, such as those relating to property held by joint tenants and tenants in common, to the drainage of meadows, and the like, and then concludes as follows: "We find in these statutes no exercise of the right of eminent domain, or of the governmental power of taxation."

§ 183. The mill acts fall under the eminent domain power. —There can be no question, it seems to us, but that the flooding of land by a mill-dam is a taking. It interferes with the right to have the water of the stream flow off in its accustomed manner, and excludes the owner from the use and enjoyment of so much of the land as is covered by water, and may greatly deteriorate that which is not flooded. This has been expressly held to be a taking by the Supreme Court of the United States,<sup>15</sup> and by almost every court in the Union.<sup>16</sup> It is the appropriation of private property to a particular use, and this can only be done under the eminent domain power. It follows, therefore, that it can only be done for a public use, and upon just compensation being made. Consequently, the only possible basis upon which the mill acts can stand is that mills are a public use within the meaning of the constitution. This can only be true of that class of mills which are obliged to serve the public, and, unless the acts are limited to such mills, they cannot be sustained. The Massachusetts court escapes this conclusion by maintaining that the flooding of lands by a mill-dam is not a taking. "A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. But it is not so. It confers no right in the land upon the mill owner and takes none from the land

<sup>15</sup> *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

<sup>16</sup> *Ante*, § 67.

owner."<sup>17</sup> The Massachusetts doctrine rests upon this position, and we think we have shown that the position is untenable.<sup>18</sup> The prohibition of the constitution applies to the legislative power in all its branches, and prevents private property from being appropriated to a particular use, unless that use is by or for the public.

<sup>17</sup> *Lowell v. Boston*, 111 Mass. p. 466. In *Boston Mfg. Co. v. Burgin*, 114 Mass. 340, 341, 343, the position of the court is further defined as follows: "Such exercise of the right of flowage is not the enjoyment of an easement in the land flowed. It is not adverse to the title or possession of the owner; and being permitted by law, and not actionable except by complaint for compensation, it will not ripen into title by lapse of time. When the right has become absolute by the payment of gross damages, or by exercise of the right without compensation for more than twenty years, it is commonly called an easement. But it is an easement in respect of the use of the stream only, and not an interest in or right over the land flowed. *Williams v. Nelson*, 23 Pick. 141; *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 13 Allen 10. The right to maintain the dam and to keep up the head of water is given to all mill-owners by statute. The flowage of adjacent lands is incidental, and compensation is made according to the degree of injury. But the right to occupy the surface of the land with water of the pond is not taken, and the land-owner may exclude it if he sees fit to do so. And when the right of the mill-

owner becomes absolute by paying gross damages or by prescription, it is only a right to keep up the dam without rendering compensation for such incidental injury." See also *Turner v. Nye*, 154 Mass. 579, 28 N. E. Rep. 1048, where the same idea is repeated. In *Wood v. Kelley*, 30 Me. 47, the right of flowage is spoken of as an easement.

<sup>18</sup> *Field, C. J.*, in a dissenting opinion, in *Turner v. Nye*, 154 Mass. 579, 28 N. E. Rep. 1048, says: "Notwithstanding what has been said in some of our decisions, overflowing a person's land without his consent is a taking of property while the overflow continues, and is a tort which would be enjoined unless the statutes authorized it. The mill acts were originally sustained on the ground that the erection of water mills was for the public benefit, and this was strictly true of grist-mills and saw-mills, if the public had the right to have their grain ground and their logs sawed at the mills. The acts, however, extended to mills of all kinds, in most of which the interests of the public were less direct; still, the erection of water mills, when water was the only available source of power, was always of public concern, sufficient to justify the damming of

We have treated this question thus at length, not because we think that the mill acts in themselves are an evil, but because we believe that they cannot be justified upon principle without virtually expunging the words public use from the constitution. The principle of these decisions may be used to justify the invasion of private rights for any purpose which the legislature or the courts for the time being may happen to consider of public utility. The courts should enforce the constitution as it is, and leave the people, if they deem mill acts essential to the prosperity of the State, to provide for them by an amendment to the constitution.<sup>19</sup>

§ 183a. Promoting fish culture, cranberry culture and the like.—In Massachusetts a statute which authorized a person to erect a dam and flood the lands of others, subject to the duty of making compensation as under the mill acts, for the purpose of cultivating fish for his own personal use, pleasure or profit, was held valid, on the same ground as the mill acts.<sup>20</sup> The statute is held not to be an exercise of the power of eminent domain, but of the power to make

streams, if compensation were paid to the persons whose lands were overflowed. Mill acts were in force long before the adoption of the constitution, and it could not properly be held that it was the intention of that instrument to render them void. But the damming of the waters of a running stream, so that the lands of the upper proprietor are overflowed, is something more than the reasonable use of the water, which every proprietor is entitled to make, as it runs through his land, without paying any compensation to the upper or lower proprietors. It has never been supposed that the mill acts would be sustained if they contained no provision for

compensation to the persons whose lands were flowed."

<sup>19</sup> The constitution of Colorado provides "that private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches, on or across the lands of others, for agriculture, mining, milling, domestic or sanitary purposes." Sec. 14, Art. 2. This was held to authorize condemnation of land for a ditch to carry water to operate an electric light plant. *Lamborn v. Bell*, 18 Col. 346, 32 Pac. Rep. 989, 7 Am. R. R. & Corp. Rep. 747.

<sup>20</sup> *Turner v. Nye*, 154 Mass. 579, 28 N. E. Rep. 1048.

laws for the good and welfare of the commonwealth, and for the government and ordering, thereof and of the subjects of the same, and the opinion is expressed that the flooding is not a taking, since the owner whose land is flowed may bank out the water. A similar statute exists, permitting the erection of dams in aid of the cultivation of cranberries. The constitutionality of the latter act has not been challenged or directly passed upon, but its validity has been assumed in numerous cases.<sup>21</sup> A statute declaring that it should not be actionable to cross uncultivated private lands to fish in public waters, provided no damage was done, was held void as authorizing the taking of private property for private use.<sup>22</sup>

§ 184. Development of mines.—The tendency of those decisions which sustain the mill acts, is illustrated by some cases now to be noticed. The legislature of Nevada passed an act in which it was declared that “the production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested and from which all derive a benefit; so the mining, milling, smelting or other reduction of ores are hereby declared to be for the public use and the right of eminent domain may be exercised therefor.” In *Daton Mining Co. v. Sewell*,<sup>23</sup> the question was whether the company could condemn a strip of land, “in order to transport the wood, lumber, timbers and other materials to enable it to conduct and carry on its business of mining.” The strip of land after being condemned, would be the private property of the mining company. The court, after reviewing the mill cases at length, say: “In the light of these authorities, nearly all of which were decided prior to the adoption of our State constitution, I think it would be an unwarranted assumption on our part to declare that the framers of the constitution did not intend to give to the term ‘public use’ the meaning of public

<sup>21</sup> *Bearse v. Perry*, 117 Mass. 211; *Hinckley v. Nickerson*, 117 Mass. 213; *Blackwell v. Phinney*, 126 Mass. 458; *Howes v. Grush*, 131 Mass. 207; *Turner v. Nye*,

154 Mass. 579, 28 N. E. Rep. 1048.

<sup>22</sup> *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. Rep. 323.

<sup>23</sup> 11 Nev. 394, 408, 1876.

utility, benefit and advantage, as construed in the decisions we have quoted. The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits of this State. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the State. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of "mining, milling, smelting or other reduction of ores," it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth; and a road to and from the mines is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now, it so happens, or, at least, is liable to happen, that individuals, by securing title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such locations. In my opinion, the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this State many of the advantages which other States possess; but by way of compensation to her citizens, has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present



prosperity of the State is entirely due to the mining developments already made, and the entire people of the State are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals." The act was of course sustained, and, conceding the mill acts to be valid, the conclusions of the court are sound. The decision was approved in a subsequent case in which it was held that land might be condemned for a shaft.<sup>24</sup> So it has been held in Georgia that land could be condemned for a ditch to conduct water for hydraulic mining.<sup>25</sup> And yet it was held in Georgia, only six years before, that even grist-mills under public regulation were not a public use.<sup>26</sup> No reference, however, was made to this or any other case.

On the other hand the validity of such laws has been denied in California,<sup>27</sup> and Pennsylvania,<sup>28</sup> and virtually so in West Virginia.<sup>29</sup> This is undoubtedly the correct view. In the California case it was sought to condemn land for a bedrock flume to carry dirt and gravel from mining claims and for a place of deposit for the tailings and refuse from the mines. The court say: "The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly

<sup>24</sup> Overman Silver Mining Co. v. Corcoran, 15 Nev. 147, 1880; and see Douglass v. Byrnes, 59 Fed. Rep. 29, 31.

<sup>25</sup> Hand Gold Mining Co. v. Parker, 59 Ga. 419, 423, 1877. The court say: "The right of eminent domain may be exercised by the general assembly in this State, when it is for the public good, either through the officers of the State, or through the medium of corporate bodies, or by means of individual enterprise." Adding to the wealth of

the State by the production of gold was held to be a sufficient public good.

<sup>26</sup> Loughbridge v. Harris, 42 Ga. 501, 1871.

<sup>27</sup> Consolidated Channell Co. v. Central Pacific R. R. Co., 51 Cal. 269, 1876; see also Gillan v. Hutchinson, 16 Cal. 153.

<sup>28</sup> Waddell's Appeal, 84 Pa. St. 90; Edgwood R. R. Co.'s Appeal, 79 Pa. St. 257.

<sup>29</sup> Valley City Salt Co. v. Brown, 7 W. Va. 191.

be subverted by it. It is a private enterprise to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the constitution which permits the taking of private property for public use after just compensation made." This language is of general application.<sup>30</sup> The taking of private property for the development of mines may be authorized by the constitution, and this has been done in Colorado and other States.<sup>31</sup>

§ 185. Drains, ditches, levees, etc., for improving wet and overflowed land. — Statutes for the improvement and reclamation of low, wet and overflowed lands by means of drains and levees have been common in the United States for at least a century. These statutes have been made to apply to a great variety of circumstances and differ greatly in their phraseology, purpose and details. There has been much litigation growing out of these statutes, in which their validity has not been questioned, and in which, therefore, their validity has been tacitly assumed. There have also been quite a number of cases in which these statutes have been assailed as unconstitutional. They have generally been upheld, but their validity has been put upon different grounds by different courts, some holding that they are referable to the power of eminent domain and subject to the constitutional limitations on that power,<sup>32</sup>

<sup>30</sup> A law exists in Iowa allowing the condemnation of property for the purpose of draining mines. But, as to whether it is valid in that respect, it has not been decided. See *Ahern v. Dubuque Lead & Level Mining Co.*, 48 Ia. 140. And see generally *Butte etc. R. R. Co. v. Montana U. R. R. Co.*, 16 Mon. 504, 41 Pac. Rep. 232.

<sup>31</sup> Ante, § 18, 22a, 35a, 52a. *Downing v. More*, 12 Col. 316, 20 Pac. Rep. 766; *Lamborn v. Bell*,

18 Col. 346, 32 Pac. Rep. 989, 7 Am. R. R. & Corp. Rep. 747.

<sup>32</sup> *People v. Supervisors of Saginaw Co.*, 26 Mich. 22; *Jenal v. Green Island Draining Co.*, 12 Neb. 163; *Draining along Pequest River*, 41 N. J. L. 175; *Same*, 39 N. J. L. 433; *People v. Nearing*, 27 N. Y. 306; *Burk v. Ayers*, 19 Hun 17; *Matter of Ryers*, 72 N. Y. 1; *Hartwell v. Armstrong*, 19 Barb. 166; *Seely v. Sebastian*, 4 Or. 25; *Sessions v. Krunkilton*, 20 Ohio St. 349; *Fleming v. Hull*,

others holding that they are an exercise of the police power, or of the still more general power to make all such laws as the legislature shall deem for the good of the State, and hence are not subject to the limitations as to public use and just compensation.<sup>33</sup>

§ 186. Decisions referring such improvements to the police power, or power to legislate for the general welfare. —The leading case on this subject is that of *Coster v. Tide Water Co.*<sup>34</sup> The court say: "But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of the property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the drainage of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated by all juriconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present constitution, and repeatedly recognized by our

73 Ia. 598, 35 N. W. Rep. 673; *Kinnie v. Base*, 68 Mich. 625, 36 N. W. Rep. 672; *Askam v. King County*, 9 Wash. 1, 36 Pac. Rep. 1097; *Hayward v. Snohomish County*, 11 Wash. 429, 39 Pac. Rep. 652.

<sup>33</sup> *O'Relley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *State v. Blake*, 36 N. J. L. 442; *Pool v. Trexler*, 76 N. C. 297; *Winslow v. Winslow*, 95 N. C. 24; *Donnelly v. Decker*, 58

Wis. 461; *Shelley v. St. Charles Co.*, 17 Fed. Rep. 909; *Lowell v. Boston*, 111 Mass. 454, 468; *Wurts v. Hoagland*, 114 U. S. 606; *Hagar v. Supervisors of Yolo Co.*, 47 Cal. 222; *Zigler v. Menges*, 121 Ind. 99, 22 N. E. Rep. 782; *State v. Stewart*, 74 Wis. 620, 43 N. W. Rep. 947; *State v. McNay*, 90 Wis. 104, 62 N. W. Rep. 917. Compare *in re Theresa Dr. Dist.*, 90 Wis. 301, 63 N. W. Rep. 288.

<sup>34</sup> 18 N. J. Eq. 54, 68, 1866.

courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the constitution vested the legislative power in the Senate and general assembly, it conferred the power to make these public regulations as a well understood part of the legislative power." This case is relied upon in all subsequent cases which refer the drainage and levee-acts to the police power, or power to legislate for the general welfare.<sup>35</sup> The position is stated by Wells, J., in *Lowell v. Boston*,<sup>36</sup> as follows, referring to the acts for the improvement of meadows: "The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individual rights to such modifications as the commissioners may judge to be most practicable to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard for the interests of all as well as of each." P. 469. The acts in question are likened by Wells, J., to the mill acts, acts in relation to the repair of houses and mills owned by tenants in common, acts for the partition of joint estates, for the regulation of wharves, etc.<sup>37</sup> The question is elaborately considered in the recent case of *Donnelly v. Decker*,<sup>38</sup> but no new or different arguments or principles are therein referred to. The general proposition is that, when several estates are affected detrimentally by some common cause which cannot be removed except by some common improvement, then the legislature may direct such improvement to be made at the common expense, under its general power

<sup>35</sup> See *O'Relley v. Kankakee Draining Co.*, 32 Ind. 169; *Zigler v. Menges*, 121, Ind. 99, 22 N. E. Rep. 782; *Pool v. Trexler*, 76 N.

C. 297; *Donnelly v. Decker*, 58 Wis. 461.

<sup>36</sup> 111 Mass. 454.

<sup>37</sup> 111 Mass. p. 468.

<sup>38</sup> 58 Wis. 461, 1883.

to legislate for the public welfare. If the cases referred to are examined, it will be seen that this general conclusion is inferred from the assumed validity of laws relating to adjoining proprietors and joint estates. But none of these laws attempt to appropriate a man's property to a particular use against his will, and therefore do not support the conclusion which is sought to be derived from them.<sup>30</sup>

<sup>30</sup> When the authorities are carefully examined, it appears that the view that the drainage acts are referable to the police power, or general welfare power, has very little support. In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, the decision is by the Chancellor only, but though this view is casually approved by the Court of Errors and Appeals in *State v. Blake*, 36 N. J. L. 442, it is clearly disapproved in *Matter of Drainage along Pequest River*, 41 N. J. L. 175, where such acts are sustained on the ground of their having been in existence when the constitution was adopted and having been acquiesced in ever since. What is said in *Lowell v. Boston*, 111 Mass. 454, is dictum only. *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169, is based wholly upon *Coster v. Tide Water Co.*, ante, and subsequent cases in the same State, by implication at least, sanction the view that such works fall under the power of eminent domain. *Hoss v. Davis*, 97 Ind. 79; *Neff v. Reed*, 98 Ind. 341; *Lipes v. Hand*, 104 Ind. 503; *Heick v. Voight*, 110 Ind. 279. But in a more recent case it is said: "Our own cases, already cited, refer the authority to direct the drainage of wet lands to the police power of

the State, and in so far as the drainage does promote the health, comfort and convenience of the public it is by virtue of this great power that the authority is exercised." *Zigler v. Menges*, 121 Ind. 99, 22 N. E. Rep. 782. *Pool v. Trexler*, 76 N. C. 297, is an extreme case and entitled to little respect as an authority outside of North Carolina, as is evident from the following, which contains all that is said by way of argument on the point: "These two powers, 'eminent domain,' and 'police regulations,' are distinct, and yet they are frequently confounded. By the one, the property of A is given to B. By the other, the property of A is left in him, but is made subservient to the general welfare. 'Cartways,' Bat. Rev. Ch. 104, § 38, furnishes an analogy. Under the power to make 'police regulations,' the land of A is made subservient to the land of B for the purposes of a road. After some contestation the question of the power of the General Assembly was yielded. So in our case the power of the General Assembly to make the land of A subservient to the land of B for the purpose of drainage must alone be yielded upon the authorities and upon

§ 187. These improvements referable to the eminent domain power.—All the statutes in question provide for constructing drains or levees across the lands of those who are unwilling to have them. Private property is thus devoted to a particular use, permanent in its nature, against the will of its owner. The rights of exclusion, of user and of disposition are interfered with or entirely destroyed. The question is, whether this can be done without an exercise of the power of eminent domain. It is not a question of advantage or disadvantage to the owner, but of constitutional right. The police power, so far as it relates to property, is a power to regulate its use, and is negative or inhibitory in its character. A man cannot be compelled, under the police power, to devote his property to any particular use, however advantageous to himself or beneficial to the public; but he may be compelled to refrain from any use which is detrimental to the public.<sup>40</sup> This is the beginning and the end of the police power over private property. No instance can be cited, outside of the mill and drainage acts, (which are in controversy), in which the owner of private property has been compelled to devote it, or submit to its devotion, to a particular use, by virtue of the police power, or of any other power except that of eminent domain.<sup>41</sup>

Again, if the acts in question are not under the power of

the reason of the thing." This case is followed in *Winslow v. Winslow*, 95 N. C. 24. The case of *Wurts v. Hoagland*, 114 U. S. 606, went up from New Jersey and simply follows the New Jersey law, the point of the decision being that the drainage laws of that State, as interpreted and applied by the courts, did not result in depriving the citizen of his property without due process of law, or in depriving him of the equal protection of the laws. In *Donnelly v. Decker*, 58 Wis. 461, *State v. Stewart*, 74 Wis. 620, 43 N. W. Rep. 947, and *State*

*v. McNay*, 90 Wis. 104, 62 N. W. Rep. 917, the drainage laws in question were upheld as an exercise of the police power, while in the case of *In re Theresa Dr. Dist.*, the drainage law there involved was held invalid as authorizing the taking of property for a use which was not public. A more particular statement of these cases will be found in the notes to § 198, post.

<sup>40</sup> See ante, § 156 et seq.

<sup>41</sup> *Cooley*, Const. Lim. chap. 16; *Dillon*, Munic. Corp. § 93 et seq.; *Sedgwick Const. Law*, pp. 435-441.

eminent domain, then there is no obligation to make compensation for the property appropriated for ditches or levees,<sup>42</sup> and one proprietor might be compelled to contribute both land and money for an improvement which is no benefit to him. A tract of land which requires drainage may be so situated that it can only be drained by a ditch through another tract which does not require it and would not be benefited by it.<sup>43</sup> In such case certainly the drain could only be made under the power of eminent domain.<sup>44</sup>

<sup>42</sup> Sedgwick Con. Law, 499-502; *State v. Blake*, 36 N. J. L. 442, 447; *Mugler v. Kansas*, 123 U. S. 623. In nearly all the cases it is assumed that compensation must be made, but in *Donnelly v. Decker*, 58 Wis. 461, the contrary doctrine is distinctly held. But the case of *In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. Rep. 288 (1895), distinctly holds "that to dig ditches or drains across the lands of private owners, under an apparent legislative authority, is a taking of the lands," and such taking can only be made for a public use and upon the payment of just compensation. Compare *State ex rel. v. Stewart*, 74 Wis. 620, 43 N. W. Rep. 947; *State v. McNay*, 90 Wis. 104, 62 N. W. Rep. 917.

<sup>43</sup> *People v. Nearing*, 27 N. Y. 306; *Askam v. King County*, 9 Wash. 1, 36 Pac. Rep. 1097.

<sup>44</sup> In *Askam v. King County*, 9 Wash. 1, 36 Pac. Rep. 1097, it is intimated that this might be done under the police power. The court, after having determined that the drainage act in question could not be sustained as an exercise of the eminent domain power, proceed to say:

"The act in question cannot be sustained on this ground. Can it be as an exercise of the police power of the State? We think not; for while it is undoubtedly true that in extreme emergencies the rights of private parties, as to property, must yield to the requirements of the public, yet, to authorize such interference, the emergency must be such as to make the action necessary. The law under consideration was not, in our opinion, enacted for the purpose of authorizing private rights to be interfered with without compensation, because necessary for the protection of the public. It is true that there are some things in the act which indicate that the interests of the public were to be considered in the determination of the question as to whether or not the improvement was necessary, but there nowhere appears any intention to declare that the public interests are such that it is necessary that private rights should be set aside in order that they may be protected. Even if we concede that the requirements of the law are such that the board of county commissioners must decide

And, in any case, the land occupied by drains or ditches is devoted to a particular use, and this, as we have shown in discussing the mill acts, cannot be done under any branch of the legislative power, except the use be public and compensation be made.<sup>45</sup> In other words, it can only be done by invoking the eminent domain power.

§ 188. The question of public use.—The promotion of the public health is undoubtedly a public use within the meaning of the constitution, and private property may be taken for the construction of drains, levees or other works in order to accomplish this object.<sup>46</sup> In New York it is

that the swamps to be drained are a nuisance, before they will proceed in the matter, yet the intention does not appear in the act to declare the nuisance to be of such imminent danger to the public welfare as to require private property of others than those maintaining the nuisance to be taken without compensation. Under the provisions of the act, the land of private parties situated at some distance from the swamps and low lands to be drained may be taken; and to sustain such taking under the police power of the State would require such a clear declaration on the part of the legislature of its intent to take such property for that purpose without compensation, as to make such intention certain. The act in question does not make this intention so apparent, if apparent at all." But we apprehend that if the legislature had distinctly declared their intention, that the lands of A might be taken without compensation for a drain to abate a nuisance solely on the lands of B, the court would have held it invalid as to A.

<sup>45</sup> Ante, § 183.

<sup>46</sup> "That the promotion and preservation of the public health is a public purpose, cannot be doubted. The legislation of the State in creating boards of health in cities, villages and towns, and vesting in them great, if not extreme and arbitrary powers, show this. There is scarcely any one object which has been the subject of more enactments than this, or as to which more power is given to officials over the citizen and his property, and by more summary proceedings." *Matter of Ryers*, 72 N. Y. 1; also *New Orleans Drainage Co.*, 11 La. An. 338; *Dingley v. Boston*, 100 Mass. 544; *Bancroft v. Cambridge*, 126 Mass. 438; *Zigler v. Menges*, 121 Ind. 99, 22 N. E. Rep. 782; *Hull v. Baird*, 73 Ia. 528, 35 N. W. Rep. 613; *Kinnie v. Base*, 68 Mich. 625, 36 N. W. Rep. 672; *State v. Stewart*, 74 Wis. 620, 43 N. W. Rep. 947; *In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. Rep. 283; *Duke v. O'Bryan*, 100 Ky. 710; *Lewis county v. Gordon*, 20 Wash. 80, 54 Pac. Rep. 779; *Skagit*



held that drains can only be constructed for this purpose.<sup>47</sup> As wet lands are undoubtedly unhealthful, it is evident that the public health may be made the real or ostensible ground of nearly all the drainage laws which have ever been passed. It is never an objection to an exercise of the power of eminent domain that it is instigated by private persons whose private interests will thereby be promoted. So a drain which will in fact promote the public health is none the less a public use because it is sought by particular individuals whose estates will be thereby improved. Most drainage laws, however, are not conditioned upon the public health. Some of these laws permit any one or more persons to construct a drain across the land of others without any consideration of the public health or public welfare.<sup>48</sup> Such statutes clearly permit the taking of private property for private use, and are void.<sup>49</sup> On the other hand a drain through a large tract of wet or swampy land belonging to numerous proprietors, into which all can drain

County v. McLean, 20 Wash. 92, 54 Pac. Rep. 781.

<sup>47</sup> Matter of Ryers, 12 N. Y. 1. So by statute in Michigan, 1 Howell's Stat. 1882, p. 474; Kinnle v. Base, 68 Mich. 625, 36 N. W. Rep. 672. And see Hull v. Baird, 73 Ia. 528, 35 N. W. Rep. 613; Hulburt v. Harris, 3 App. Div. 30, 37 N. Y. Supp. 1056. But the constitution has since been changed to permit condemnation for drains for agricultural purposes. Ante, § 40; Matter of Tut-hill, 36 App. Div. N. Y. 492.

<sup>48</sup> An act of Connecticut passed in 1853, R. S. 1854, p. 786, permitted any owner of land to drain across the land of others. This was construed, but no question made as to its validity, in French v. White, 24 Conn. 170.

<sup>49</sup> Reeves v. Treasurer of Wood Co., 8 Ohio St. 333; Cypress Pond

Draining Co. v. Hooper, 2 Met. (Ky.) 350. A statute of Nebraska permitted any three or more persons, being owners of lands wet or liable to be overflowed, to form a corporation for constructing drains or levees for the reclamation of their lands. This act was held void in Jenal v. Green Island Draining Co., 12 Neb. 163, 167. The court say: "There are no conditions upon which their right to locate a ditch depend, except that they are the owners of wet or overflowed land. A ditch may be located and opened across the land of individual owners merely to subserve private interests." A similar law conferring like authority upon any five or more was upheld in Anderson v. The Kerns Draining Co., 14 Ind. 199. See also Norfleet v. Cromwell, 70

whose lands incline towards it, would seem to be a public use, although the only object accomplished is the drainage and improvement of private property. As has been already observed, a public use does not necessarily mean for the use of the entire community, but for the use of all within a given locality.<sup>50</sup> Thus a drain for the use of all within a certain district is as much for public use as a school-house for the use of a particular school district. The school-house is for the use of those who have children of school age residing within the school district. The drain is for those who have land needing drainage within the drainage district. The public outside of the school district have no right in the school-house whatever, though all share indirectly in the benefits which result from the schooling there provided. So of the drainage district. The improvement of the land in a particular locality is a benefit to the whole State. The instances of a supply of water or gas for a city or village afford similar analogies. The difference between such a ditch which is kept open and public for the use of a particular district and land taken for a mill or mill-dam is obvious. Unless the mill is for public use, as heretofore explained, the mill and dam become the private property of the person or corporation making the condemnation, as absolutely and exclusively as if it had

N. C. 634; *Pool v. Trexler*, 76 N. C. 297. In the latter case it is said that such drains may be made to drain the property of one man or a single acre of ground. In Oregon an act which enabled any person whose land required draining to open a ditch over the land of others was upheld as being for a public use. *Seely v. Sebastian*, 4 Or. 25. An almost precisely similar statute of Iowa was held invalid, as authorizing a taking for private use. *Fleming v. Hull*, 73 Ia. 598, 35 N. W. Rep. 673. So in Indiana. *Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. Rep. 636.

<sup>50</sup> "The number of the private owners benefited do not make them the public; the principle is the same if the number is three hundred, as if it is only three." *Coster v. Tide Water Co.*, 18 N. J. Eq. p. 66. Ante, § 161. "The public use or benefit need not extend to the whole public, or any large portion of it, within the jurisdiction of the legislature. It may be limited to the inhabitants of a small locality, but the benefit must be in common, not to particular persons or estates." *O'Reilly v. Kankakee Valley Draining Co.*, 32 Ind. 169, 185.

been acquired by private purchase. Therefore, it seems to us, that a law which provides for the drainage of a given district by means of drains which are for the common use of all the lands within the district, is valid as effectuating a public use within the meaning of the constitution. But a law which enables one or more proprietors to construct a drain across the lands of others for the benefit of their particular estates, is void as authorizing a taking for a private purpose. A law such as we have indicated would be valid, might be special, designating the particular district to be drained, or general, providing for the organization of drainage districts of a quasi public character.

As we have before intimated, the legislation on this subject presents almost every conceivable variety of method. And the decisions present almost as much variety of reasoning and conclusion on the subject as the laws present in form. In the succeeding sections we have given a review of the decisions of each State, with such reference to the laws passed upon as will make them intelligible. The diversified and multifarious views expressed in these decisions and the antagonistic conclusions reached are some evidence, at least, that the courts have not found the true philosophy of the drainage question or the true criterion by which to test particular laws. Whether we have suggested them here, we leave the reader to judge.

§ 189. California.—An act incorporated a certain defined district as the Washington Drainage District of Yolo County, created a board of trustees and other officers, and provided for a tax on the district for works to be constructed under the supervision of the board. The object of the act was to secure the drainage of the district and prevent its overflow by the Sacramento River.<sup>51</sup> This act was held valid. The court say: "We think the power of the legislature to compel local improvements, which, in its judgment, will promote the health of the people, and advance the public good, is unquestionable."<sup>52</sup> An act of

<sup>51</sup> Acts 1867-8, p. 466.

<sup>52</sup> Hagar v. Supervisors of Yolo Co., 47 Cal. 222, 233.

1880<sup>53</sup> providing for a division of the whole State into drainage districts, and for an elaborate system of improvements, was declared void on other grounds than those under discussion.<sup>54</sup>

§ 189a. **Illinois.**—Drainage laws are authorized by a special provision of the constitution.<sup>55</sup>

§ 190. **Indiana.**—In this State drainage acts are upheld, both under the eminent domain and police powers.<sup>56</sup> But it must appear in each case that the proposed work will be of public utility. "The drainage of a man's farm, simply to render it more valuable to the owner, would not be a work of public utility, in the constitutional sense of the term; and a corporation, organized and acting for such a purpose, would no more be acting in a public undertaking, than would a company organized and acting for the clearing up of men's farms and putting them in a better state of cultivation than the proprietors were willing to do, though the public and adjoining proprietors might be, in a substantial degree, benefited by the operation."<sup>57</sup> Under the statute now in force it must appear that the proposed drain will improve the public health, benefit a public highway in the county, or street of a town or city, or be of public utility. The constitutionality of this statute is no longer regarded as an open question.<sup>58</sup> A statute of 1893, authorizing the formation of drainage districts and the construction of drains without any requirement that they should

<sup>53</sup> Stats. 1880, p. 123.

<sup>54</sup> *People v. Parks*, 58 Cal. 624. And see *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. Rep. 562.

<sup>55</sup> Const. 1870, Art. 4, § 31; ante, § 23; *Blake v. People*, 109 Ill. 504; *Chronic v. Pugh*, 136 Ill. 539, 27 N. E. Rep. 415.

<sup>56</sup> *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *O'Relley v. Kan-*

*kakee Valley Draining Co.*, 32 Ind. 169.

<sup>57</sup> 14 Ind. p. 202. Approved in *Tillman v. Kircher*, 64 Ind. 104.

<sup>58</sup> *Ross v. Davis*, 97 Ind. 79; *Wishmier v. State*, 97 Ind. 160; *Neff v. Reed*, 98 Ind. 341; *Anderson v. Baker*, 98 Ind. 587; *Lipes v. Hand*, 104 Ind. 503; *Helck v. Voight*, 110 Ind. 279; *Zigler v. Menges*, 121 Ind. 99, 22 N. E. Rep.

be for the benefit of the public health or of public utility, was held to be invalid.<sup>59</sup>

§ 191. **Iowa.**—Drainage for the “public health, convenience or welfare” is held constitutional.<sup>60</sup> But a statute which enabled any person, who should desire to do so, to construct a tile or other underground drain through the lands of another, was held void as authorizing a taking for private use.<sup>61</sup>

§ 191a. **Kentucky.**—The inhabitants of a certain wet district, comprising about 14,000 acres, were incorporated for the purpose of providing drainage for the same. Six persons were named as trustees and vested with the necessary powers, and authorized to levy a tax upon the lands up to the limit of 25 cents per acre per year for ten years. It was held that the act was to accomplish a private purpose and was void.<sup>62</sup> But drainage for the public health is recognized as a public use.<sup>63</sup>

§ 191b. **Michigan.**—It is held that under the constitution, as well as under the statutes, land cannot be taken for drains except to promote the public health.<sup>64</sup>

§ 192. **Nebraska.**—An act empowering any three or more persons, being owners of wet or overflowed land, to form a corporation for the construction of drains or levees over the land of others, was held void.<sup>65</sup>

§ 193. **New Jersey.**—An act for the reclamation of tide-water marshes was passed in 1788, and with various amendments has remained in force to the present time. So

782; *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. Rep. 191.

<sup>59</sup> *Gifford Drainage Dist. v. Schroer*, 145 Ind. 572, 44 N. E. Rep. 636.

<sup>60</sup> *Hatch v. Pottawattamie Co.*, 43 Ia. 442; *Patterson v. Baume*, 43 Ia. 477. *Hull v. Baird*, 73 Ia. 528, 35 N. W. Rep. 613, tends to support the proposition that drainage is a public use only when necessary for the public health.

<sup>61</sup> *Fleming v. Hull*, 73 Ia. 598, 35 N. W. Rep. 673.

<sup>62</sup> *Cypress Pond Dr. Co. v. Hooper*, 2 Met. Ky. 350.

<sup>63</sup> *Duke v. O'Bryan*, 100 Ky. 710.

<sup>64</sup> *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. Rep. 672; 1 *Howell's Statutes*, 1882, p. 474; *Const. Art. 14, § 9*.

<sup>65</sup> *Jenal v. Green Island Draining Co.*, 12 Neb. 163.

also an act for the drainage of swamp or meadow lands.<sup>66</sup> In *Coster v. Tide Water Co.*<sup>67</sup> acts of this character were referred to the police power. In the Court of Errors it was held that the construction of dikes, etc., to prevent the overflow of large districts of country, was a public use for which property might be taken. But the drainage of meadows was referred to the police power.<sup>68</sup> A special act for the drainage of lands on the upper Passaic was held valid in *State v. Blake*,<sup>69</sup> and again in the same case in a later volume,<sup>70</sup> where it was referred to the police power. In 1871 an act was passed for the drainage of wet lands where the owners of a major part of the land to be affected so desired.<sup>71</sup> In *Matter of Application for Drainage*,<sup>72</sup> this act was held valid and referred to the eminent domain power. Also in *Matter of Commissioners etc. on Pequest River*.<sup>73</sup> On an appeal of the latter case to the Court of Errors and Appeals,<sup>74</sup> the decision of the Supreme Court was affirmed, but the view that the act could be sustained as an exercise of the eminent domain power was questioned, and its validity rested upon the antiquity of such statutes and long acquiescence in them.<sup>75</sup> But, while drainage acts are thus upheld in this State, the power cannot be exercised for the profit of a private corporation not interested in the lands to be affected.<sup>76</sup>

The act of 1871 above referred to came before the Supreme Court of the United States, on appeal from the court of last resort of New Jersey, and it was held that the act did not deprive an owner of his property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.<sup>77</sup>

<sup>66</sup> Vol. 1 R. S. 1877, p. 641.

<sup>67</sup> 18 N. J. Eq. 54.

<sup>68</sup> *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 531, 1366.

<sup>69</sup> 35 N. J. L. 208, 1871.

<sup>70</sup> 36 N. J. L. 442, 447, 1872.

<sup>71</sup> Pub. Laws, 1871, p. 25.

<sup>72</sup> 35 N. J. L. 497, 1872.

<sup>73</sup> 39 N. J. L. 433, 1877.

<sup>74</sup> 41 N. J. L. 175, 1879.

<sup>75</sup> See the same case again in 42 N. J. L. 553, 1880.

<sup>76</sup> *State v. Driggs*, 45 N. J. L. 91. See also *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 518.

<sup>77</sup> *Wurts v. Hoagland*, 114 U. S. 606. After reviewing the New Jersey cases, the court say: "This review of the cases clearly shows that general laws for the

§ 194. **New York.**—Drainage works can only be executed for the public health, the promotion of which is a public use.<sup>78</sup> In the earlier cases wherein drainage laws were sustained, it appeared that the public health would be promoted, although that was not made a condition to the exercise of the powers granted.<sup>79</sup>

§ 195. **North Carolina.**—Drainage for the benefit of private estates is sustained, first as a public use under the eminent domain power, in *Norfleet v. Cromwell*,<sup>80</sup> and afterwards under the police power, in *Pool v. Trexler*,<sup>81</sup> and *Winslow v. Winslow*.<sup>82</sup>

§ 196. **Ohio.**—An act which authorized the construction of drains on the application of one or more persons, without any consideration of the public welfare, was held void; but it was held that drains, levees, etc., might be constructed when necessary for the "public health, convenience or welfare."<sup>83</sup> Thereupon, in 1859,<sup>84</sup> an act was

drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health), as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concur-

rence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9." See Ante, § 182 n. 13.

<sup>78</sup> *Matter of Ryers*, 72 N. Y. 1, 1878; *Burk v. Ayers*, 19 Hun 17.

<sup>79</sup> *Hartwell v. Armstrong*, 19 Barb. 166, 1854; *People v. Nearring*, 27 N. Y. 306, 1863; *Matter of Draining Certain Swamp Lands*, 5 Hun 116; *Woodruff v. Fisher*, 17 Barb. 224; see ante, § 188 n. 13.

<sup>80</sup> 70 N. C. 634.

<sup>81</sup> 76 N. C. 297.

<sup>82</sup> 95 N. C. 24. See also *Williamson v. Canal Company*, 78 N. C. 156.

<sup>83</sup> *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, 1858.

<sup>84</sup> Laws of 1859, p. 58.

passed authorizing County Commissioners, on petition of one or more owners, to establish ditches, drains, etc., when the same are "demanded by or will be conducive to the public health, convenience or welfare." This act was held valid in *Thompson v. Treasurer of Wood County*,<sup>85</sup> also, a similar act<sup>86</sup> passed in 1862.<sup>87</sup>

The Revised Statutes of 1886, § 4511, provide that the trustees of a township may establish a ditch whenever, in their opinion, the same will be conducive to the public health, convenience or welfare. It was held that under this statute a ditch could not be established, the only effect of which would be to render the lands of two proprietors more productive.<sup>88</sup> "The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men. The draining of marshes and ponds may be for the promotion of the public health and so become a public object; but the draining of farms to render them more productive, is not such an object." P. 204. The "public health, convenience or welfare" to be promoted have reference to the locality of the ditch. The finding that a ditch, five miles long and extending into two counties, "will be conducive to the public health, convenience and welfare of the neighborhood, is a finding that the community generally in the vicinity are benefited, and not merely the lands of the petitioner and others. It is a finding that it is for the public welfare as distinguished from a mere private advantage."<sup>89</sup> But an act which authorized the construction of levees whenever, in the opinion of the probate judge, they would be conducive to the health, convenience or welfare of any number of citizens of his county, or were necessary for the protection of the land of such citizens, was held invalid, as permitting the taking of private property for private use.<sup>90</sup>

<sup>85</sup> 11 Ohio St. 678.

<sup>86</sup> Laws of 1862, p. 93.

<sup>87</sup> *Sessions v. Crunkelton*, 20 Ohio St. 349.

<sup>88</sup> *McQuillen v. Hatton*, 42 Ohio St. 202.

<sup>89</sup> *Chesbrough v. Commissioners*, 37 Ohio St. 508, 516.

<sup>90</sup> *Smith v. Atlantic & Great*



§ 197. **Oregon.**—An act under which any person might secure the construction of a ditch over the land of others was held valid, as promoting a public use, in *Seely v. Sebastian*.<sup>91</sup>

§ 197a. **Washington.**—A drainage law which provided for the construction of drains and ditches, dikes and levees, but made no provision for compensation to those whose lands were taken or damaged, unless the owners appeared and claimed compensation, was held to be void, as being in violation of the constitution, which requires compensation to be first made for property taken or damaged for public use.<sup>92</sup> The question of public use was not discussed.

§ 198. **Wisconsin.**—A statute that any six or more freeholders, residing in any town and desiring to have any ditch or drain laid out for draining any marsh, swamp or overflowed lands, or any existing ditch enlarged, might make application therefor to the supervisors of the town, who were required to lay out the same, "if, in their judgment such ditch, drain or enlargement is demanded or will conduce to the public health or welfare," was held valid as an exercise of the police power.<sup>93</sup> A special act relating to Dane county was also upheld, which permitted the construction of drains and other works for the reclamation of wet lands, upon the application of twenty-five or more owners of such lands, provided that commissioners, after a hearing of parties interested, should be of the opinion "that the public health or welfare will be thereby promoted."<sup>94</sup> On the other hand a law of 1891 that "whenever a majority of the owners of lands within a district proposed to be

*Western R. R. Co.*, 25 Ohio St. 91, 1874.

<sup>91</sup> 4 Or. 25.

<sup>92</sup> *Askam v. King County*, 9 Wash. 1, 36 Pac. Rep. 1097; *Hayward v. Snohomish County*, 11 Wash. 429, 39 Pac. Rep. 652. And see *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781.

<sup>93</sup> *Donnelly v. Decker*, 58 Wis. 461; *State v. McNay*, 90 Wis. 104, 62 N. W. Rep. 917 (Apr. 3, 1895). In the first of these cases, p. 466, it is said: "It is obvious, at first blush, that this law cannot be sustained as providing for a work for the public use."

<sup>94</sup> *State v. Stewart*, 74 Wis. 620, 43 N. W. Rep. 947.

organized, who shall have arrived at lawful age, and who shall represent one-third in area of the lands to be reclaimed or benefited, or whenever the adult owners of more than one-half of such lands desire to construct a drain or drains, ditch or ditches, levee or levees, or other work across the lands of others for agricultural, sanitary or mining purposes, or to maintain and keep in repair any such drain," etc., they may apply to the circuit court of the proper county, and if the court finds "that the proposed drain or drains, ditch or ditches, levee or levees, or other works, is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes," the court shall appoint three competent persons as commissioners to lay out and construct the proposed works, was held to be invalid as authorizing the taking of private property for private use.<sup>95</sup>

<sup>95</sup> In *re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. Rep. 288 (May 15, 1895). The court says: "There is in the entire statute no expression or intimation that it was any part of the consideration upon which the improvement should be authorized that it should be either necessary or desirable to promote any public interest, convenience, or welfare. No doubt, such an improvement may be useful to some, or perhaps many, private owners of land, by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly and remotely, in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. *Donnelly v. Decker*, supra. Some home or homes might be made more cheerful and more healthful. But one man's prop-

erty cannot be taken to make another man's home more cheerful or healthful. It is only when it will make the homes of the public more healthful that any man's property can be taken for "sanitary purposes." But it is urged that the term "sanitary purposes" comprehends and imports the idea of the public health. If so, it might save this statute. Webster defines the word "sanitary" as "pertaining to or designed to secure sanity or health." The *Century Dictionary* defines it as "pertaining to health or hygiene, or the preservation of health." It will be seen that the word is of purely abstract meaning. It is utterly devoid of any suggestion of numbers or of public or private relation. It imports neither. For such purpose it is strictly neutral and impartial. Without some qualifying word, it is inoperative to designate the pur-

§ 199. **Other States.**—The foregoing embrace all of the decisions which have come to our notice in which drainage laws have been assailed as not being a legitimate exercise of the eminent domain power. Some miscellaneous cases in which they are attacked on other grounds are given in the note.<sup>96</sup>

§ 200. **Levees, dikes, etc.**—Dikes and levees to prevent the overflow of extensive districts of country by streams or tide-waters are a public use.<sup>97</sup> They are a direct and imme-

pose as a public one, or as in the interest of the public health. It is, no doubt, for the legislature to specify the use and purpose for which it authorizes private property to be appropriated. It should be expressed clearly; for it cannot be enlarged by a doubtful construction, nor be presumed to be larger than the purpose which is expressed. Dill. Mun. Corp. (4th Ed.) § 603. This is not a question of the construction of ambiguous words or terms. But it is an entire failure to express in any form that the taking of property for which it provides is to be for a public use. So it must be held that it does not provide for a taking for a public use. It could not lawfully provide for a taking for any other than a public use. It cannot support proceedings for the condemnation of lands as for a public use. It is entirely invalid."

We do not see how these different cases can be reconciled. In the last case it is held to be settled law "that to dig ditches or drains across the lands of private owners, under an apparent legislative authority, is a taking of the lands." It does not make any difference what

the purpose of the ditch or drain is. To occupy a man's land with a ditch or drain is to take his land. Consequently such a ditch or drain can only be constructed for a public purpose. In *Donnelly v. Decker*, 58 Wis. 461, it is held that a ditch or drain to promote the public health or welfare is not a public purpose. Hence it follows by the logic of the latest decision that the case of *Donnelly v. Decker* upheld the taking of private property for a private purpose, and it would seem to be overruled by implication. But the latest decision does not attempt, in express terms, to overrule, explain or distinguish the prior cases.

<sup>96</sup> *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *New Orleans Drainage Co.*, 11 La. An. 338; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Shelley v. St. Charles Co.*, 17 Fed. Rep. 909.

<sup>97</sup> *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 523; *Matter of Drainage along Pequest River*, 41 N. J. L. 175, 178; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Norfleet v. Cromwell*, 70 N. C. 634, 639; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. Rep. 332.

diate benefit to all the land affected by them, and may be necessary for the preservation of life and property. Both the powers of taxation and of eminent domain may be exercised for this purpose.<sup>98</sup> If the public health will be promoted by such improvements, the case is clear.<sup>99</sup> If the public ways or other public means of travel, transportation or communication will be improved or secured from interruption and damage, the case is equally clear.<sup>1</sup> The only doubt arises, when the only object and effect of such works is the improvement of private property. In such case the same principles would seem to apply as in case of drains

<sup>98</sup> In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, and 518, the act passed upon created a corporation for the reclamation and protection of the tide-water marshes about Newark bay by means of dikes, drains and other works. Of this act the Court of Errors and Appeal say: "That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated is to reclaim and bring into use a tract of land covering about one-fourth of the county of Hudson and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition it impairs very materially the benefits which naturally belong to the adjacency of the territory of the State to its navigable waters. It is difficult, from the great expense of such works, to build roads across it, and consequently it has heretofore interposed a barrier to anything like easy access, except by means of railroads, from one town to another situated upon its borders. To remove these

evils and to make this vast region fit for habitation and use seems to me plainly within the legitimate province of legislation; and, to effect such ends, I see no reason to doubt that both the prerogatives of taxation and eminent domain may be resorted to. From the earliest times, the history of the legislation of this State exhibits many examples of the exercise of both these powers for purposes not dissimilar, and by these means, without question, many improvements have been effected. The principle is similar to that which validates the transfer, by legislative authority, of private property to private corporations for the construction of railroads and canals, or the construction of sewers and streets, and the imposition of the expense upon the lands benefited," p. 520. See also *Cooley on Taxation*, p. 427; *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.), 36 S. W. Rep. 1041.

<sup>99</sup> See post, § 201; ante, § 188.

<sup>1</sup> *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518.

and ditches for the reclamation of wet lands, or the irrigation of arid lands.<sup>2</sup>

There is also another view by which the works in question can be sustained. Every natural stream is public, in the sense of being for the common use and benefit of the proprietors of all the lands drained by it or subject to its influence, and any improvement of it by dikes or otherwise for the benefit of such lands is a public purpose, as being for the common use and benefit of all such lands as are affected by the improvements. Therefore, the construction of a levee which shall confine the waters of a stream to its channel and prevent the overflow of the adjacent country is a public use for which property may be taken or taxes levied. And similar considerations apply to tide waters. The shores of the sea are public for all purposes, and may be improved, not only for the purposes of navigation, but also to prevent erosion or submersion of the adjacent land. According to this view, dikes and levees to prevent the overflow of streams or tide-waters are a public use per se, and it rests absolutely with the legislature to determine when the power of eminent domain shall be exercised for that purpose, and what the extent of benefit must be to justify a resort to that power.<sup>3</sup> The

<sup>2</sup> See ante, § 188, post, § 202.

<sup>3</sup> We do not understand how the taking for a certain definite purpose can be a public use or not, according to the result of an investigation of the circumstances of each proposed exercise of the power for that purpose. A purpose for which property may be taken must be held to be a public use or not, according to the nature and character of the purpose itself. As to whether the power of eminent domain shall be exercised for a purpose in its nature public, and the time, manner and extent of its exercise, in the absence of special

constitutional provisions, are exclusively legislature questions. A contrary view is expressed in a drainage case in 35 N. J. L., p. 505. In *Smith v. Atlantic & Great Western R. R. Co.*, 25 Ohio St. 91, an act which authorized the erection of a levee whenever, in the opinion of the probate judge, it will be conducive to the health, convenience or welfare of any number of citizens of his county, or is necessary for the protection of the land of such citizens or any of them from overflow, was held invalid as authorizing the taking of property for private use. It seems to us

courts may always protect the individual from the perversion of laws authorizing the appropriation of private property for public use. Levee acts have almost uniformly been upheld by the courts, though they have more frequently been called in question under the power of taxation than under that of eminent domain.<sup>4</sup> In Louisiana, lands on the banks of the Mississippi are subjected to a levee servitude, by virtue of which the same may be occupied for that purpose without compensation.<sup>5</sup> In Missouri levee acts have been referred to the police power.<sup>6</sup>

§ 201. The public health.—Nothing is more vital to the welfare of the State than the public health, and works calculated to promote the public health, by removing the causes of disease or affording to populous communities a supply of pure air, pure water or means of necessary recreation, are a public use.<sup>7</sup> We have already had occasion to refer to this subject in connection with public parks<sup>8</sup> and drainage.<sup>9</sup> Drains may be constructed or dams destroyed<sup>10</sup> in order to relieve low grounds of their excessive moisture and render them more salubrious. Low grounds in the neighborhood of populous districts may be filled to abate a nuisance, and the power of eminent domain exercised for this purpose.<sup>11</sup>

this law might be upheld, on the ground that the erection of a levee to confine the waters of a stream within their natural channel is a public use. An act which is in fact for the promotion of a public use may be upheld, though the legislature has declared a use which is not public.

<sup>4</sup> Upheld under power of eminent domain: *Tide Water Co. v. Coster*, 18 N. J. Eq. 518. Upheld under taxing power: *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Williams v. Cammack*, 27 Miss. 209; *Alcorn v. Hamer*, 38 Miss. 652; *Daily v. Swope*, 47 Miss.

367; *Eoro v. Phillips*, 4 Dill. 216; *McGhee v. Mathis*, 21 Ark. 40; *Cooley on Taxation*, p. 427; *Gould on Waters*, § 247.

<sup>5</sup> See ante, § 150.

<sup>6</sup> *Morrison v. Morey*, 146 Mo. 543, 48 S. W. Rep. 629.

<sup>7</sup> *Matter of Ryers*, 72 N. Y. 1.

<sup>8</sup> Ante, § 175.

<sup>9</sup> Ante, § 188.

<sup>10</sup> *Woodruff v. Fisher*, 17 Barb. 224; *Talbot v. Hudson*, 16 Gray 417; *Miller v. Craig*, 11 N. J. Eq. 175.

<sup>11</sup> *Dingley v. Boston*, 100 Mass. 544; *Bancroft v. Cambridge*, 126 Mass. 438; *Sweet v. Rechel*, 159

§ 202. **Irrigation.**—The construction of canals, conduits and other works to convey or store water for irrigation in localities where the rainfall is insufficient or too uncertain for agricultural purposes, and which are for the use of all those capable of being supplied by them upon terms which may be regulated by law, would seem to be a public use within the meaning of the constitution.<sup>12</sup> Egypt was wholly dependent upon such works for its bountiful crops, and the principle is not unlike that which applies to public drains for the reclamation of low lands.

§ 203. **Taking for the United States.**—Property taken for the use of the general government is taken for a public purpose, for which the State may exercise its power of eminent domain. Thus it has been held that the United States may, through the machinery of the States, take pri-

U. S. 380, 16 S. C. Rep. 43; ante, § 156d.

<sup>12</sup> *Oury v. Goodwin* (Ariz.), 36 Pac. Rep. 376, 4 Am. R. R. & Corp. Rep. 81; *Cummings v. Peters*, 56 Cal. 593; *Lux v. Haggin*, 69 Cal. 255; *Irrigation District v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379; *Irrigation v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *In re Madera Irrigation Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 675, 5 Am. R. R. & Corp. Rep. 283; *Aliso Water Co. v. Baker*, 95 Cal. 268, 30 Pac. Rep. 537; *Lindsay Irrigation Co.*, 97 Cal. 676, 32 Pac. Rep. 802; *Salazar v. Smart*, 12 Mont. 395, 30 Pac. Rep. 676; *Umatilla Irr. Co. v. Barnhart*, 22 Or. 389, 30 Pac. Rep. 37; *McGee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. Rep. 967; *Witterding v. Green* (Idaho), 45 Pac. Rep. 134; *Ellinghouse v. Taylor*, 19 Mon. 462; *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. Rep. 411; *Miles v. Benton Tp.*, 11 S. D. 450; *Prescott Ir-*

*rigation Co. v. Flathers*, 20 Wash. 454, 55 Pac. Rep. 635. The question is very elaborately argued by the Supreme Court of Arizona in the case first cited. The California act of 1887, which has been upheld in the California cases above cited, is declared to be unconstitutional by Ross, Circuit Judge, as authorizing the taking of property for private use, in *Bradley v. Fallbrook Irr. Dist.*, 68 Fed. Rep. 948. But this decision has been reversed in an elaborate opinion by the Supreme Court of the United States. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 S. C. Rep. 56. The taking of private property for irrigation works is provided for by a special constitutional provision in Colorado. Ante, § 18. And see *Sand Creek Lateral Irr. Co. v. Davis*, 17 Col. 326, 29 Pac. Rep. 742; *San Luis Land etc. Co. v. Kenilworth Canal Co.*, 3 Col. App. 244, 32 Pac. Rep. 860.

vate property for a postoffice,<sup>13</sup> for a fort,<sup>14</sup> for works to supply the national capital with water,<sup>15</sup> or for the purpose of prosecuting the coast survey.<sup>16</sup> This power has been denied in Michigan.<sup>17</sup> It seems to us, however, that property taken for the use of the national government, being for the use of all the people of all the States, is certainly for the use of the people of that State where it is located, who would be likely to be especially interested in the improvement to be made.

§ 204. **Taking all of a tract when only a part is required.**—Statutes for widening or opening streets sometimes provide that, where part of a lot is required, the whole may be taken and the part not required sold for the benefit of the improvement. Such statutes are not void, but they cannot be enforced against the will of the owner, as the part not needed for the street would be taken for private use.<sup>18</sup> But the owner may consent to the taking, and thereby a valid title will be acquired by the city.<sup>19</sup> The taking of the compensation awarded amounts to such consent, and the owner cannot afterwards reclaim the property.<sup>20</sup> If the law simply provides that the owner may require the city to take

<sup>13</sup> *Burt v. Merchants' Insurance Co.*, 106 Mass. 356.

<sup>14</sup> *In re League Island*, 1 Brews. Pa. 524; *Gilmer v. Lime Point*, 13 Cal. 229.

<sup>15</sup> *Reddell v. Ryan*, 14 Md. 444.

<sup>16</sup> *Orr v. Quimby*, 54 N. H. 590.

<sup>17</sup> *Trombley v. Humphrey*, 23 Mich. 471, 476. The court say: "In the first place there can be no necessity for the exercise of this right by the States for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances. In the second place, the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the gen-

eral government under, and by means of which, it is to appropriate lands for national objects, is not among the ends contemplated in the creation of the State government."

<sup>18</sup> *Matter of Albany Street*, 11 Wend. 149; *Embury v. Conner*, 3 N. Y. 511; S. C. 2 Sandf. 98; *Matter of John and Cherry Streets*, 19 Wend. 659; *Bennett v. Boyle*, 40 Barb. 551; *Dunn v. City Council of Charleston*, Harper (11 S. C.) 189; *Gregg v. Baltimore*, 56 Md. 256.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Sherman v. Kane*, 46 N. Y. Supr. Ct. 310; *Embury v. Conner*, 3 N. Y. 511, overruling same case in 2 Sandf. 89.



the whole, it is not objectionable, since it is inoperative without the owner's consent.<sup>21</sup>

§ 205. **Miscellaneous cases: Settling private controversies.**—The legislature of Kentucky passed an act creating a corporation with power to fence a tract of some fifteen hundred acres of land which was subject to annual floods carrying off the fences. The cost was to be made a tax upon the several owners, according to acreage. The law was held invalid as not being for a public purpose.<sup>22</sup> A New York corporation was formed under the general law for the purpose of acquiring certain swamp, marsh and other lands in the County of Kings, which were particularly described in the certificate of incorporation, and to excavate, construct and maintain one or more basins, docks, wharves and piers, and to erect thereon suitable warehouses, mills, furnaces, foundries, factories, shops and such other buildings as might be necessary and proper for docking, loading and unloading vessels, for the storage of goods and for carrying on generally the business of a dock, warehousing and manufacturing company, and in any and every other proper and suitable way promoting and increasing the facilities for commerce, manufactures and business generally: A special act, afterwards passed, authorized the company to condemn any of the lands specified which it could not acquire by agreement, and provided that the basin of the company should at all times be open to public use for all vessels that might apply therefor, but left by far the greater part of the works under the absolute control of the company. The Court of Appeals held that the object was not a public use. "We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public pur-

<sup>21</sup> Mayor etc. of Baltimore v. Clunet, 23 Md. 449, 464; Boulat v. Municipality No. 1, 5 La. An. 363.

<sup>22</sup> Scuffletown Fence Co. v. McAllister, 12 Bush. (Ky.) 312. The

following are similar cases: Hancock Stock & Fence Law Co. v. Adams, 87 Ky. 417, 9 S. W. Rep. 246; Fort v. Goodwin, 36 S. C. 445, 15 S. E. Rep. 723.

pose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."<sup>23</sup> To take the property of one and transfer it to another in order to settle a private controversy concerning title to the property, is not a taking for public use, however numerous the controversies or however extensive the property in question.<sup>24</sup> In 1869 an act was passed in Pennsylvania to provide for the extinction of irredeemable ground rents upon payment, by the owners of the land out of which they issued, of damages or compensation to be ascertained as provided in the act. This was held invalid as authorizing the taking of private property for private use.<sup>25</sup> An act authorizing a court to confirm and make valid a deed previously executed by a married woman, which was not properly acknowledged, was held invalid as an attempt to take private property for a private purpose.<sup>26</sup> Public bath houses<sup>27</sup> and poor farms<sup>28</sup> are public uses, for which, doubtless, private property could be condemned. Land may be taken to procure gravel for the repair of streets.<sup>29</sup> Where an act provides for a general scheme for laying out, changing and discontinuing streets

<sup>23</sup> Matter Application of E. B. W. & M. Co., 96 N. Y. 42, 48.

<sup>24</sup> Van Horne's Lessee v. Dorrance, 2 Dall. 304; Lessee of Pickering v. Rutty, 1 S. & R. 511. These are cases growing out of laws for settling disputes between Connecticut and Pennsylvania claimants to property in the latter State. See also Hoyer v. Swan's Lessee, 5 Md. 237.

<sup>25</sup> Palairot's Appeal, 67 Pa. St. 479.

<sup>26</sup> Pearce's Heirs v. Patton, 7 B. Mon. 162, 167.

<sup>27</sup> Poillon v. Brooklyn, 101 N. Y. 132.

<sup>28</sup> Tyrone Tp. School District's Appeal, 1 Monaghan (Pa. Supm. Ct.) 20.

<sup>29</sup> Sommerville v. Waltham, 170 Mass. 160.

for the improvement of a particular locality and provides for acquiring the fee of discontinued streets to be held for private use, it is not obnoxious to the objection that it authorizes a taking for private use.<sup>30</sup>

§ 206. Combination of public and private use in the same act or proceeding.—If a private use is combined with a public use in such a way that the two cannot be separated, the whole act is void. Thus, an act which authorized the erection of a dam across a navigable river by a city, either for the purpose of water works for the city, or for the purpose of leasing the water for private use, was held void.<sup>31</sup> So, in a State where the only kind of mills regarded as a public use are public grist-mills, a statute which authorized the condemnation of property for the erection of a mill or other machinery was held void.<sup>32</sup> In this case the court say: "We have, then, the case of a statute, which, in the employment of a generic phrase, without expressing the different species included in that genus, attempts, by words not separable, to confer a general authority, a part of the patent object of which are within, and others without, the pale of constitutional power. In such case, we have no discretion but to pronounce the entire clause unconstitutional." So an application under an act to condemn property for purposes, part of which are within, and part not within, the act, will be bad in toto.<sup>33</sup>

§ 206a. Taking for other than a public purpose violates the fourteenth amendment of the federal constitution.—The

<sup>30</sup> Matter of Mayor etc. of New York, 157 N. Y. 409, 52 N. E. Rep. 1126, affirming 28 App. Div. 143.

<sup>31</sup> Attorney General v. Eau Claire, 37 Wis. 400. After this decision the act was amended so as to make the water-works compulsory and permit the leasing of only surplus water, and was then sustained. State v. Eau Claire, 40 Wis. 533.

<sup>32</sup> Sadler v. Langham, 34 Ala. 311, 333.

<sup>33</sup> Thus, under an act for the erection of grist-mills, an order of the court condemning land for a grist-mill, saw-mill and paper-mill is void. Harding v. Goodlet, 3 Yerg. 41. And see McCulley v. Cunningham, 96 Ala. 583, 11 So. Rep. 694; In re Barre Water Co., 62 Vt. 27, 20 Atl. Rep. 109, 3 Am. R. R. & Corp. Rep. 136.

fourteenth amendment forbids any State to deprive a person of his property without due process of law. To take property for other than a public purpose, either under the guise of taxation or of eminent domain, is to violate this provision.<sup>34</sup> Hence the purpose of the taking may present a federal question, though arising under State laws. But in thus applying the federal constitution the broadest possible construction should be given to the eminent domain power. The words "public use" import a limitation upon the eminent domain power with respect to the purposes for which it may be exercised.<sup>35</sup> The States are not compelled to retain this limitation. In its absence, the power may be exercised for any purpose which promotes the general welfare of the State.<sup>36</sup> This would include many cases where the property taken is devoted to strictly private uses, as in the case of private roads, mills, drains and the like.

<sup>34</sup> *Loan Association v. Topeka*, 20 Wall. 655; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 S. C.

Rep. 56; *Matter of Tuthill*, 36 App. Div. N. Y. 492.

<sup>35</sup> Ante, § 163.

<sup>36</sup> Ante, § 1.

## CHAPTER VIII.

### MEANING OF THE WORDS "DAMAGED," "INJURED," AND "INJURIOUSLY AFFECTED."

#### I. IN STATUTES.

§ 206b. Statutes giving damages for change of grade: Connecticut. —These statutes vary so much that we shall notice the decisions of each State separately.

A statute of Connecticut provides that "when the owner of land adjoining a public highway, or of any interest in such land, shall sustain special damage or receive special benefit to his property by reason of any change in the grade of such highway by the town, city or borough in which such highway be situated, such town, city or borough shall be liable to pay to him the amount of such special damage, and shall be entitled to receive from him the amount or value of such special benefits, to be ascertained in the manner provided for ascertaining damages and benefits occasioned by laying out or altering highways therein."<sup>1</sup> It is held that the "special damage" to be allowed under this statute "differs in no essential respect from the damage that would be appraised for injury to adjoining land, if the alteration were an original layout, causing a similar injury. Such damage includes the diminution in the market value of the land caused by the alteration, to be determined by considering everything by which that value is legitimately affected."<sup>2</sup> The destruction of a sidewalk or shade trees may be taken into consideration.<sup>3</sup> If a change is made

<sup>1</sup> R. S. § 2703; and see cases cited below.

<sup>2</sup> Platt v. Town of Milford, 66 Conn. 320, 34 Atl. Rep. 82; Cook v. Ansonia, 66 Conn. 413, 34 Atl. Rep. 183; Holley v. Town of Torrington, 63 Conn. 426, 433, 28

Atl. Rep. 613; Shelton Co. v. Birmingham, 62 Conn. 456, 26

Atl. Rep. 348; S. C. 61 Conn. 518, 24 Atl. Rep. 978.

<sup>3</sup> Shelton Co. v. Birmingham, 62 Conn. 456, 26 Atl. Rep. 348; Holley v. Town of Torrington,

without complying with the statute an action at law will lie for the damage.<sup>4</sup> A change of the sidewalk or from an existing grade is within the statute.<sup>5</sup>

§ 207. The same: Indiana.—A statute of Indiana provides that, “when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured or affected by such change, and such damages shall be collected by the city from the party or parties taking such change of grade in the manner provided for the collections of street improvements.”<sup>6</sup> The statute applies only to cities, not to incorporated towns.<sup>7</sup> If the city fails to have the damages assessed and paid as required by the statute, a common law action will lie.<sup>8</sup> But no action lies to recover nominal damages.<sup>9</sup> An established grade within the statute is a grade established in pursuance of some ordinance or order of the common council, involving some general plan of improvement or grading of a street or some specific portion thereof.<sup>10</sup> Accordingly no damages can be recovered when the change is from a natural grade merely.<sup>11</sup> Where the city engineer and committee on streets agreed with the plaintiff on a grade to which he adapted his building, and afterwards the council fixed a lower grade, this was held not to be a change within the statute.<sup>12</sup> A change

63 Conn. 426, 28 Atl. Rep. 613;

Cook v. City of Ansonia, 66

Conn. 413, 34 Atl. Rep. 183.

<sup>4</sup> Holley v. Town of Torrington, 63 Conn. 426, 28 Atl. Rep. 613; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. Rep. 183.

<sup>5</sup> McGar v. Bristol, 71 Conn. 652, 42 Atl. Rep. 1000.

<sup>6</sup> R. S. 1881, § 3073.

<sup>7</sup> Baker v. Town of Shoals, 6 Ind. App. 319, 33 N. E. Rep. 664.

<sup>8</sup> La Fayette v. Wortman, 107 Ind. 404; La Fayette v. Nagle, 113 Ind. 425.

<sup>9</sup> Burkham v. Ohio & M. R. R. Co., 122 Ind. 344, 23 N. E. Rep. 799.

<sup>10</sup> Mattingly v. Plymouth, 100 Ind. 545; City of Anderson v. Bain, 120 Ind. 254, 22 N. E. Rep. 323; City of Valparaiso v. Adams, 123 Ind. 250, 24 N. E. Rep. 107; City of Huntington v. Griffith, 142 Ind. 280, 41 N. E. Rep. 8, 589.

<sup>11</sup> Ibid.; Keehn v. McGillicuddy, 15 Ind. App. 580, 44 N. E. Rep. 554.

<sup>12</sup> Mattingly v. Plymouth, 100 Ind. 545.

of grade of the sidewalk or part of the street is within the statute.<sup>13</sup> Where the town of Wabash established the grade of a street with reference to which the plaintiff built, and afterwards the town became a city, and then changed the grade so established, it was held the city was not liable, because it had not established the prior grade.<sup>14</sup>

§ 208. **The same: Iowa.**—A statute provided that, where a grade had been established and improvements made with respect thereto, and the grade was changed so as to injure or diminish the value of such property, the city making the change should pay to the owner or owners of said property the amount of such damage.<sup>15</sup> Under this statute the damage to both land and buildings may be recovered.<sup>16</sup> If, however, the property is worth more after the change than before, it has not been damaged, although expense will have to be incurred to adjust it to the new grade.<sup>17</sup> The measure of damages is the difference in value before and after the improvement.<sup>18</sup> Where a new pavement was put down, and the surface at the curb was a few inches lower than the old pavement; but the curb and center of the street remained the same, it was held not to be a change of grade within the statute.<sup>19</sup> Putting macadam on a street, although it elevates the surface, is not a change of grade.<sup>20</sup> One who has filled in and graded his lot preparatory to building upon it, may recover, though no building has been erected.<sup>21</sup> An established grade is one adopted by ordi-

<sup>13</sup> *Kokomo v. Mahan*, 100 Ind. 242.

<sup>14</sup> *Wabash v. Alber*, 88 Ind. 428. To same effect *City of Huntington v. Griffith*, 142 Ind. 280, 41 N. E. Rep. 8, 589. Compare *Nolte v. City of Cincinnati*, 3 Ohio C. C. 503.

<sup>15</sup> Code, § 469.

<sup>16</sup> *Dalzell v. Davenport*, 12 Ia. 437; *Hempstead v. Des Moines*, 52 Ia. 303. It is immaterial that the change is back to the natural

surface. *Resseguen v. Sioux City*, 94 Ia. 543, 63 N. W. 184.

<sup>17</sup> *Hempstead v. Des Moines*, 52 Ia. 303.

<sup>18</sup> *Stewart v. Council Bluffs*, 84 Ia. 61, 50 N. W. Rep. 219; *McCosh v. Burlington*, 72 Ia. 26.

<sup>19</sup> *Coates v. Dubuque*, 68 Ia. 550.

<sup>20</sup> *Warren v. Henry*, 31 Ia. 31.

<sup>21</sup> *Chase v. Sioux City*, 86 Ia. 603, 53 N. W. Rep. 333; to same

nance or resolution of the council. The fact that a city has worked or improved a street at a particular grade does not make it an established grade within the statute.<sup>22</sup> The action accrues when the change is actually made, and when any part of the work is done in front of the property.<sup>23</sup> The remedy given by the statute is exclusive.<sup>24</sup> The act does not apply to changes which were ordered before the law took effect, but which were not executed until afterward.<sup>25</sup> Where the grade of a street was changed, which necessitated changes on intersecting streets, it was held a recovery could be had for damages to property on the latter streets, by reason of such incidental change, though no change was formally ordered.<sup>26</sup>

§ 208a. **Same: Kansas.**—An established grade cannot be changed until the damage to property owners, which may be caused thereby, has been assessed and paid or deposited, and a particular mode of assessment is provided for.<sup>27</sup> Under this statute there is no liability when a change is made from a natural to an established grade.<sup>28</sup> Where the notice served on the plaintiff showed that the grade would be raised two or three inches in front of his property, which would be no damage, but the change actually ordered and made was a lowering of eighteen inches, it was held the city was liable in a common law action.<sup>29</sup> The measure of

effect, *Seasongood v. Cincinnati*, 5 Ohio C. C. 225. And as to what constitutes an improvement with respect to the established grade, see also, *Conklin v. City of Keokuk*, 73 Ia. 343, 35 N. W. Rep. 444.

<sup>22</sup> *Kepple v. Keokuk*, 61 Ia. 653.

<sup>23</sup> *Hempstead v. Des Moines*, 63 Ia. 36. Where an established grade was lowered six feet, and the city first lowered the roadway and the plaintiff recovered damages for that, and afterwards the sidewalks were lowered and

the plaintiff brought another suit, it was held that the former suit was a bar.

<sup>24</sup> *Cole v. Muscatine*, 14 Ia. 296.

<sup>25</sup> *Cotes v. Davenport*, 9 Ia. 227.

<sup>26</sup> *Conklin v. City of Keokuk*, 73 Ia. 343, 35 N. W. Rep. 444.

<sup>27</sup> Laws, 1881, C. 37, § 18; Gen. stat. 1889, par. 562; *Parker v. City of Atchison*, 46 Kan. 14, 26 Pac. Rep. 435.

<sup>28</sup> *Interstate Consol. R. T. R. Co. v. Early*, 46 Kan. 197, 26 Pac. Rep. 422.

<sup>29</sup> *City of Topeka v. Sells*, 48 Kan. 520, 29 Pac. Rep. 604.



damages is the difference in market value before and after the change.<sup>30</sup>

§ 208b. **Same: Maine.**—A recent statute provides that, “when a way or street is raised or lowered by a surveyor or person authorized, to the injury of an owner of land adjoining, he may apply in writing to the municipal officers, and they shall view such way or street and assess the damages, if any have been occasioned thereby.”<sup>31</sup> The measure of damages is the diminution of market value caused by the change, and if there is no diminution there can be no recovery.<sup>32</sup>

§ 209. **The same: Massachusetts.**—The statute provides that, “where an owner of land adjoining a highway sustains damage in his property by reason of any raising or lowering or other act done for the purpose of repairing such way, he shall have compensation therefor.”<sup>33</sup> Under this statute the abutting owner is entitled to recover for any damages to his property by reason of the proper execution of any such improvement.<sup>34</sup> The word “damage” is not confined to injuries for which an action lay at common law, as between individuals, but covers all damages flowing from the change, such as interfering with access, or the flow of surface water.<sup>35</sup> Where a street is laid out, the compensation awarded includes such damages as may be occasioned by the construction of the street as proposed in the order of laying out;<sup>36</sup> but, where a street was laid out in 1861, and a grade established, but the street was not built at such grade, and the city by repairs and otherwise recognized the existing grade, and in 1877 the street was made to conform to the grade so originally established, it was held to

<sup>30</sup> *Parker v. City of Atchison*, 46 Kan. 14, 26 Pac. Rep. 435; *City of Topeka v. Martineau*, 42 Kan. 337, 22 Pac. Rep. 419.

<sup>31</sup> Stat. 1887, C. 97.

<sup>32</sup> *Chase v. City of Portland*, 86 Me. 367, 29 Atl. Rep. 1104.

<sup>33</sup> Statutes, C. 44, §§ 19, 20.

<sup>34</sup> *Flagg v. Worcester*, 13 Gray, 601.

<sup>35</sup> *Woodbury v. Beverly*, 153 Mass. 245, 26 N. E. Rep. 851.

<sup>36</sup> *Ryan v. Boston*, 118 Mass. 248; *Geraghty v. Boston*, 120 Mass. 416; *Murphy v. Boston*, *Ibid.* 419; *Brady v. Fall River*, 121 Mass. 262.

be a change of grade within the statute.<sup>37</sup> If no grade is established when the street is laid out, the establishing of a grade afterwards and bringing the street to such grade is a change within the statute.<sup>38</sup> The statute has been held to apply to a case where, by removing dirt from in front of premises for the purpose of repairing elsewhere, access thereto was interfered with.<sup>39</sup> An agreement not to claim compensation for land taken for a highway, does not preclude the owner from recovering damages for a change of grade made after the highway has been established.<sup>40</sup> Where both the street and abutting land fall away from natural causes, the street may be raised to the established grade without incurring liability.<sup>41</sup> If property abuts on two streets both of which are improved, the damages by the improvement of each street must be kept distinct.<sup>42</sup> The statute only applies to property abutting on the street where the change is made.<sup>43</sup> The action accrues when the work is done, and not when the change is ordered.<sup>44</sup>

§ 210. The same: *Minnesota*.—The charter of St. Paul provides that, if a grade once established is changed, "all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected or injured in consequence of the alteration of such grade." The act prescribed no remedy and a common law action was held proper. It was also held in the same case that the right of action accrued when the change was finally ordered by the proper tribunal, and that an owner need not delay his action until the change was actually made, and that a recovery could be had for all the damages which would be occasioned by the

<sup>37</sup> *Cambridge v. County Commissioners*, 125 Mass. 529.

<sup>38</sup> *Snow v. Provincetown*, 109 Mass. 123; *Lane v. Boston*, 125 Mass. 519.

<sup>39</sup> *Burr v. Leitchester*, 121 Mass. 241.

<sup>40</sup> *Fernald v. Boston*, 12 Cush. 574.

<sup>41</sup> *Garrity v. Boston*, 161 Mass. 530, 37 N. E. Rep. 672.

<sup>42</sup> *Bemis v. Springfield*, 122 Mass. 110.

<sup>43</sup> *Wilbur v. Taunton*, 123 Mass. 522.

<sup>44</sup> *Brown v. Lowell*, 8 Met. 172.

change.<sup>45</sup> Subsequently acts were passed providing a remedy and making it exclusive, but they were held not to apply to a change made before their passage.<sup>46</sup> A viaduct over a railroad which took all the travel along the street was held to be a change of grade within the statute.<sup>47</sup>

§ 211. **The same: Missouri.**—The charter of the city of St. Louis contains the following provision: "The city shall be liable for damages sustained by any owner of real estate upon which permanent buildings shall have been erected by any change of grade of any street upon which such real estate shall front." Under this provision the city was held liable for damages by a causeway in the middle of the street, thirty-two feet wide, though a space nine feet wide between the causeway and the sidewalk was left on each side of the street at the old grade.<sup>48</sup> So the city was held liable where the grade of a street was ordered to be raised, but was not in fact raised to the full height ordered.<sup>49</sup> The charter of the city of St. Joseph provided for damages to abutting owners, in case of a change of grade which had

<sup>45</sup> *McCarthy v. St. Paul*, 22 Minn. 527. It seems to us the decision is wrong as to the time when the cause of action arises in such a case. A change of grade on paper does not injure any one. After a change has been ordered it might be reconsidered before execution. In the meantime an owner might have obtained judgment. See post, § 667.

<sup>46</sup> *Taylor v. St. Paul*, 25 Minn. 129.

<sup>47</sup> *Wilkin v. St. Paul*, 33 Minn. 181. For a statute held not to impose such liability, see *Willis v. City of Winona*, 59 Minn. 27, 60 N. W. Rep. 814.

<sup>48</sup> *Stickford v. St. Louis*, 7 Mo. App. 217; *affd.* 75 Mo. 309. The city contended that the charter

only embraced a change of grade over the whole width of the street. On this point the court say: "Such an interpretation would substitute the shadow for the substance. It would allow the city to evade responsibility for every change of grade by leaving a few feet, or even a few inches, untouched along the lateral boundaries of the street. \* \* \* The change of grade contemplated by the charter provision is manifestly any such alteration as will raise or lower the principal current of travel or transportation." To same effect, *Dyer v. St. Louis*, 11 Mo. App. 590. See also *Mitchell v. St. Louis*, 14 Mo. App. 600.

<sup>49</sup> *Schumacher v. St. Louis*, 3 Mo. App. 297.

been previously fixed or established. It was held that a grade might be fixed or established by improving a street at its natural grade without any ordinance in terms fixing the grade.<sup>50</sup> Compensation is now secured by the constitution.<sup>51</sup>

§ 212. **The same: New Jersey.**—Under a statute giving damages for a change of grade, it was held that, where a street is widened and then the grade of the street subsequently changed, the damages occasioned by reducing the new part to the grade of the old must be presumed to have been included in the award for the original taking.<sup>52</sup> Where the statute allows damages only to improved property, an award for property not improved will be void.<sup>53</sup> One to whom damages have been awarded for a change of grade cannot be assessed for benefits for the same improvement. The first adjudication, that the premises are damaged by the change, concludes both parties while it stands.<sup>54</sup> A statute making it lawful for a municipality to give compensation for a change of grade was held to be obligatory.<sup>55</sup>

§ 213. **The same: New York.**—Acts giving damages for a change of grade in the streets of New York City have existed since 1852.<sup>56</sup> A general act of 1883, applicable to incorporated villages, gives compensation for damages by a change of grade.<sup>57</sup> There have probably been many special acts on the subject.<sup>58</sup> There appears to have been very little litigation under these acts which has found its way

<sup>50</sup> *Gibson v. Zimmerman*, 27 Mo. App. 90.

<sup>51</sup> See post, § 223.

<sup>52</sup> *Van Riper v. Essex Road Board*, 38 N. J. L. 23. The statute was passed in 1858. See R. S. p. 1009, § 70; *Vorrath v. Hoboken*, 49 N. J. L. 285.

<sup>53</sup> *State v. Sayer*, 41 N. J. L. 158.

<sup>54</sup> *Davis v. City of Newark*, 54 N. J. L. 595, 25 Atl. Rep. 336.

<sup>55</sup> *Clark v. Elizabeth*, 61 N. J. L. 565, 40 Atl. Rep. 616, 737.

<sup>56</sup> Laws of 1852, c. 52, pp. 46-47; Laws of 1867, vol. 2, c. 697, pp. 1748-1750; Laws of 1872, vol. 2, c. 729, p. 1726.

<sup>57</sup> Laws 1883, c. 113; *Whitmore v. Village of Tarrytown*, 137 N. Y. 409, 33 N. E. Rep. 489.

<sup>58</sup> See *People v. Fitch*, 147 N. Y. 355, 41 N. E. Rep. 695; *People v. Gilon*, 121 N. Y. 551, 24 N. E. Rep. 944; *People v. Gilon*, 76 Hun. 346, 27 N. Y. Supp. 704.

into the reports. It is held that the remedy provided by the statute is exclusive and that an ordinary suit will not lie.<sup>59</sup> Also that the right to damages accrues when the work is done, and not when the change is ordered.<sup>60</sup> The gradual removal of a bank of earth between the traveled roadway and the street line, is not a change of grade.<sup>61</sup> Where the statute gives damages to the owners of buildings fronting on the street, it excludes the allowance of damages to the land.<sup>62</sup> The fact that one has deeded the land for the street, does not preclude him from claiming damages for a change of grade afterward made.<sup>63</sup> A change of grade made by a railroad company by permission of the village is within the statute.<sup>64</sup> So is a change from a natural grade, which has not been established except by user.<sup>65</sup> There is no vested right in the remedy and it may be taken away by repeal of the statute.<sup>66</sup> A statute giving compensation to the owners of real estate claimed to be damaged was held not to embrace a tenant for years.<sup>67</sup> A viaduct over a railroad was held to be a change of grade.<sup>68</sup>

§ 214. **The same: Pennsylvania.**—An act of 1854 in relation to Philadelphia provided “that, in any alteration that may be made of the regulation of any portion of the city, in conformity with the provisions of this section, whereby damages may ensue to private property, compensation shall be made for such damages, to be ascertained and paid by law as in case of damages for opening streets.” This act

<sup>59</sup> *Heiser v. New York*, 104 N. Y. 68, affirming 29 Hun 446; *Smith v. White Plains*, 67 Hun 81, 22 N. Y. Supp. 450; *Matter of Ehrsam*, 37 N. Y. App. Div. 272.

<sup>60</sup> *People v. Zoll*, 97 N. Y. 203.

<sup>61</sup> *Whitmore v. Tarrytown*, 137 N. Y. 409, 33 N. E. Rep. 489.

<sup>62</sup> *People v. Gilon*, 76 Hun 346, 27 N. Y. Supp. 704.

<sup>63</sup> *Bartlett v. Tarrytown*, 52 Hun 380, 24 N. Y. St. 272, 5 N. Y. Supp. 240.

<sup>64</sup> *Matter of Stack*, 50 Hun 385, 21 N. Y. St. 953, 3 N. Y. Supp. 231.

<sup>65</sup> *Bartlett v. Tarrytown*, 55 Hun 492, 30 N. Y. St. 341, 8 N. Y. Supp. 739; *Matter of Greer*, 39 N. Y. App. Div. 22.

<sup>66</sup> *Smith v. White Plains*, 67 Hun 81, 22 N. Y. Supp. 450.

<sup>67</sup> *Matter of Ehrsam*, 37 App. Div. N. Y. 272.

<sup>68</sup> *Matter of Grade Crossing Comrs.*, 154 N. Y. 550.

only applies to the change of an established grade.<sup>69</sup> The right to damages is held to accrue when the new grade has been duly established and confirmed according to law. The owner is not required to wait until the work is completed.<sup>70</sup>

§ 215. **The same: Rhode Island.**—A statute gave compensation to abutting owners for damages “by any change in the grade of a highway.” Where a grade was recognized by the city as the grade of the street, and was afterwards changed, it was held that the abutting owner was entitled to damages, though the first grade had never been formally established by the board of aldermen.<sup>71</sup> But a subsequent case holds that the statute only applies to a change from an established grade.<sup>72</sup> One having a leasehold interest as tenant from year to year is such an owner.<sup>73</sup> Any claim for such damages was required to be presented to the board of aldermen within forty days after the change was completed; it was held that after the forty days the aldermen had no jurisdiction to allow it.<sup>74</sup>

§ 215a. **The same: South Carolina.**—A statute giving damages for altering a street was held to include a change of grade.<sup>75</sup>

§ 216. **The same: Tennessee.**—A statute provided that, when the owner of a lot desired to build, he might apply to the city authorities and have the grade of the street fixed, and if, after the building was constructed, the grade was changed, he should have compensation for any damages. The grade of a street was established in 1866, and plaintiff raised

<sup>69</sup> *In re Ridge Ave.*, 99 Pa. St. 469; *Philadelphia v. Wright*, 100 Pa. St. 235; *Matter of Change of Grade of Germantown Ave.*, 15 Phila. 413; *In re Levering St.*, 14 Phila. 349; *In re Germantown Ave.*, 14 Phila. 351; *In re Plan 166*, 143 Pa. St. 414, 22 Atl. Rep. 669.

<sup>70</sup> *Matter of Change of Grade of 5th and 6th streets*, 12 Phila. 587; *Campbell v. Philadelphia*, 108 Pa. St. 300.

<sup>71</sup> *Aldrich v. Providence*, 12 R. I. 241.

<sup>72</sup> *Gardner v. Town Council of Johnstown*, 16 R. I. 94, 12 Atl. Rep. 888.

<sup>73</sup> *Gilligan v. Providence*, 11 R. I. 258.

<sup>74</sup> *Anness v. Providence*, 13 R. I. 17.

<sup>75</sup> *Garraux v. Greenville*, 53 S. C. 575, 31 S. E. Rep. 597.

his building to correspond. Two years later the grade was changed. It was held that plaintiff could recover under the statute.<sup>76</sup> It is held that the statute should be liberally construed, and that a grade may be established without an ordinance. If the city council directs its engineer to fix grades, and he does so, such grades are established within the statute.<sup>77</sup>

§ 216a. **Same: Washington.**—A general statute prohibits a change of grade so as to necessitate the raising or lowering of buildings, without prepayment of the damages.<sup>78</sup> It is held to apply only to a change from a grade, either formally adopted by ordinance or resolution, or by the actual improvement of the street.<sup>79</sup>

§ 217. **The same: Wisconsin.**—The charter of Milwaukee required the city to establish the grade of all streets, and contained this provision: "When the established grade shall be thereafter altered, all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected in consequence of the alteration of such grade." Under this statute it was held that it was no defence to an action for damages by the changing of an established grade, that the city had not established the grade of all its streets;<sup>80</sup> that the doing of the work by the plaintiff in front of his premises pursuant to an order of the council was no bar to his

<sup>76</sup> *Mayor of Nashville v. Nichol*, 3 Bax. 338. The court say: "We think, however, it is the duty of the court to give a liberal construction to statutes in favor of the right of a citizen to be reimbursed for damages done to his property by city authorities, occasioned by works for the advantage of the general public. The citizen whose property is thus injured, ought not to be required to bear the entire burden, the benefits of

which he shares perhaps very slightly, in common with other inhabitants of the city, the improvements frequently being of no personal advantage to him, whatever."

<sup>77</sup> *Chattanooga v. Geller*, 13 Lea, 611.

<sup>78</sup> Gen. Stat., § 759.

<sup>79</sup> *Sargent v. City of Tacoma*, 10 Wash. 212, 38 Pac. Rep. 1048.

<sup>80</sup> *Goodrich v. Milwaukee*, 24 Wis. 422.

recovery;<sup>81</sup> that the signing of a petition for a change of grade different from the one ordered was no bar;<sup>82</sup> nor the signing of a petition to complete the work already begun.<sup>83</sup> The building of a causeway forty feet wide in the middle of a street was held to be a change within the statute, though twenty feet was left on each side at the old grade.<sup>84</sup> The measure of damages is the depreciation in the value of the property caused by the change, and in arriving at this it is proper to consider the cost of adjusting the property to the new grade, the cost of making the change in the street which is a charge upon the lot, the damage to trees if any, and also any benefit which will accrue to the property by the change.<sup>85</sup> The right of action accrues when the work is done, and not when the order is passed, and suit must be brought by the owner at the former time.<sup>86</sup> A law providing that the grade of certain streets could be changed without making compensation, or, in effect, suspending the operation of the charter as to such streets, was held void as depriving the property owners affected of the equal protection of the laws.<sup>87</sup> Where a charter was repealed after an ordinance was passed for a change of grade, but before the ordinance became effective by publication, it was held to defeat the claim for compensation.<sup>88</sup> A statute gave compensation in case a municipality should close up, use or obstruct a highway so as materially to interfere with its usefulness as such, to the injury or damage of abutting owners. It was held not to apply to a change of grade.<sup>89</sup>

§ 218. The same: Other States.—Similar statutes exist,

<sup>81</sup> *Pearce v. Milwaukee*, 18 Wis. 428.

<sup>82</sup> *Luscombe v. Milwaukee*, 36 Wis. 511.

<sup>83</sup> *Herzer v. Milwaukee*, 39 Wis. 108.

<sup>84</sup> *Dove v. Milwaukee*, 42 Wis. 108.

<sup>85</sup> *French v. Milwaukee*, 49 Wis. 584; *Church v. Same*, 34 Wis. 66; *Stadler v. Same*, 34 Wis.

98; *Church v. Same*, 31 Wis. 512; *Stowell v. Same*, 31 Wis. 523; *Tyson v. Same*, 50 Wis. 78.

<sup>86</sup> *Tyson v. Milwaukee*, 50 Wis. 78; contra: *McCarthy v. St. Paul*, 22 Minn. 527.

<sup>87</sup> *Anderson v. Milwaukee*, 82 Wis. 279, 52 N. W. Rep. 95.

<sup>88</sup> *Smith v. Eau Claire*, 78 Wis. 487, 47 N. W. Rep. 830.

<sup>89</sup> *Ibid.*



or have existed, in other States, but no adjudications thereon have come to our notice.<sup>90</sup>

§ 218a. When the statute refers merely to a change of grade must it be from a previously established grade?—Such statutes are remedial and should be liberally construed and, therefore, should be held to apply to a change from a natural grade, where the street has been used at such grade.<sup>91</sup> This is in accordance with the rule adopted in construing constitutions giving compensation for property damaged or injured by public improvements.<sup>92</sup> Some courts hold that the statute refers only to a grade established by actual improvement of the street or one formally adopted by ordinance or resolution.<sup>93</sup>

§ 218b. What constitutes an established grade.—Many statutes in express terms limit the remedy for a change of grade, to a change from a previously established grade. The authorities differ as to what constitutes an established grade within the meaning of such statutes. Some hold that the grade must have been established by some express action of the municipal authorities adopting or fixing the

<sup>90</sup> See *Sawyer v. Keene*, 47 N. H. 173; *Healey v. New Haven*, 49 Conn. 394; *Seasongood v. City of Cincinnati*, 5 Ohio C. C. 225.

<sup>91</sup> *Bartlett v. Tarrytown*, 55 Hun 492, 30 N. Y. St. 341, 8 N. Y. Supp. 739; *Aldrich v. Providence*, 12 R. I. 241. And see *Cambridge v. County Comrs.*, 125 Mass. 529; *Snow v. Provincetown*, 109 Mass. 123; *Lane v. Boston*, 125 Mass. 519; *Matter of Greer*, 39 App. Div. N. Y. 22; *Blair v. Charleston*, 43 W. Va. 62.

<sup>92</sup> *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Sheey v. Kansas City Cable R. R. Co.*, 94 Mo. 574, 7 S. W. Rep. 579; *Smith v.*

*Kansas City etc. R. R. Co.*, 98 Mo. 20, 11 S. W. Rep. 259; *Davis v. Mo. Pac. R. R. Co.*, 119 Mo. 180, 24 S. W. Rep. 777, 9 Am. R. R. & Corp. Rep. 117; *Smith v. City of St. Joseph*, 122 Mo. 643, 27 S. W. Rep. 344; *Dale v. City of St. Joseph*, 59 Mo. App. 566; *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. Rep. 146; *Norristown's Appeal*, 3 Walker (Pa. Supm. Ct.) 146; *City of Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. Rep. 1059.

<sup>93</sup> *Sargent v. City of Tacoma*, 10 Wash. 212, 38 Pac. Rep. 1048; *Gardiner v. Town Council of Johnston*, 16 R. I. 94, 12 Atl. Rep. 888.

grade.<sup>94</sup> Others hold that a grade may be established by implication, or by improving the street at its natural grade or otherwise.<sup>95</sup>

§ 218c. **What constitutes a change of grade**—Macadamizing or paving a street, whereby the surface is slightly raised, is not a change of grade.<sup>96</sup> Raising or lowering a part of the street,<sup>97</sup> building a causeway in the middle,<sup>98</sup> or a viaduct over it,<sup>99</sup> have been held to be changes of grade. Filling a street which has settled, so as to compensate for the settling is not a change of grade.<sup>1</sup> Where a bank ten feet wide was left between the traveled way and the lot lines, its gradual removal by the city and others, wanting to use the earth, was held not to be a change of grade.<sup>2</sup> It is immaterial that the change is made by a railroad, with the approval of the municipal authorities.<sup>3</sup> Where the grade of two parallel adjacent streets is changed, the grade of an intersecting street between the two is not thereby changed by implication to correspond.<sup>4</sup>

§ 218d. **The right and remedy are wholly dependent upon the statute.**—There being no constitutional right to com-

<sup>94</sup> *Mattingly v. Plymouth*, 100 Ind. 545; *City of Anderson v. Bain*, 120 Ind. 254, 22 N. E. Rep. 323; *City of Valparaiso v. Adams*, 123 Ind. 250, 24 N. E. Rep. 107; *City of Huntington v. Griffith*, 142 Ind. 280, 41 N. E. Rep. 8, 589; *Kepple v. Keokuk*, 61 Ia. 653.

<sup>95</sup> *Gibson v. Zimmerman*, 27 Mo. App. 90; *Chattanooga v. Geiler*, 13 Lea, 611; see also cases cited in last section and *Smith v. Board of Comrs.*, 50 Ohio St. 628, 35 N. E. Rep. 796; *Neubert v. City of Toledo*, 9 Ohio C. C. 462; *Matter of Grade Crossing Comrs.*, 154 N. Y. 550.

<sup>96</sup> *Warren v. Henry*, 31 Ia. 31; *Coates v. Iowa*, 68 Ia. 550; *Bogard v. O'Brien (Ky.)*, 20 S. W.

Rep. 1097; *Zearfoss v. Lansdale*, 1 Mont. Co. L. R. R. 157.

<sup>97</sup> *Kokomo v. Mahan*, 160 Ind. 242. So where the sidewalk is lowered; *McGar v. Bristol*, 71 Conn. 652, 48 Atl. Rep. 1000.

<sup>98</sup> *Stickford v. St. Louis*, 7 Mo. App. 217; affirmed, 75 Mo. 309; *Dove v. Milwaukee*, 42 Wis. 108.

<sup>99</sup> *Wilkin v. St. Paul*, 33 Minn. 181. See ante, § 100b.

<sup>1</sup> *Garrity v. City of Boston*, 161 Mass. 530, 37 N. E. Rep. 672.

<sup>2</sup> *Whitmore v. Tarrytown*, 137 N. Y. 409, 33 N. E. Rep. 489.

<sup>3</sup> *Interstate Consol. T. R. R. Co. v. Early*, 46 Kan. 197, 26 Pac. Rep. 422; *Matter of Stack*, 50 Hun, 385, 3 N. Y. Supp. 231.

<sup>4</sup> *Morton v. Burlington*, 106 Ia. 50, 75 N. W. 662.

pensation for a change of grade, the whole matter is in the control of the legislature, which may give compensation to such extent and under such circumstances and conditions as it sees fit.<sup>5</sup> If a right to compensation is created and no remedy provided a common law action will lie.<sup>6</sup> So if the initiative is cast upon the municipality and it fails to have the damages assessed,<sup>7</sup> or otherwise fails to comply with the law in making the change.<sup>8</sup> If the statute provides a remedy, that is exclusive.<sup>9</sup> A repeal of the statute takes away the remedy.<sup>10</sup>

§ 218e. **When the action accrues.**—The language of the statute may determine when the action accrues, but, in the absence of anything express in the statute, the better rule is that it accrues when the work is done,<sup>11</sup> though some courts have held that it accrues when the change is ordered.<sup>12</sup>

§ 218f. **Whether the statute applies to changes ordered before but made after it takes effect.**—It has been held that such a statute did not apply to a change of grade ordered

<sup>5</sup> *Matter of Beale St.*, 39 Cal. 495.

<sup>6</sup> *McCarthy v. St. Paul*, 22 Minn. 527; *Taylor v. St. Paul*, 25 Minn. 129.

<sup>7</sup> *Lafayette v. Wortman*, 107 Ind. 404.

<sup>8</sup> *Holley v. Torrington*, 63 Conn. 426, 28 Atl. Rep. 613; *Cook v. Ansonia*, 66 Conn. 413, 34 Atl. Rep. 183; *City of Topeka v. Sell*, 48 Kan. 520, 29 Pac. Rep. 604; *Lafayette v. Nagle*, 113 Ind. 425.

<sup>9</sup> *Cole v. Muscatine*, 14 Ia. 296; *Helser v. New York*, 104 N. Y. 68, affirming 29 Hun. 446; *Anness v. Providence*, 13 R. I. 17; *Golding v. Attleborough*, 172 Mass. 223, 51 N. E. Rep. 1076; *Abel v. Minneapolis*, 68 Minn. 89; *Garrault v. Greenville*, 53 S. C. 575, 31 S. E. Rep. 597.

<sup>10</sup> *Smith v. White Plains*, 67

Hun 81, 22 N. Y. Supp. 450; *Smith v. Eau Claire*, 78 Wis. 487, 47 N. W. Rep. 830.

<sup>11</sup> *Hempstead v. Des Moines*, 63 Ia. 36; *Brown v. Lowell*, 8 Met. 172; *People v. Zoll*, 97 N. Y. 203; *Tyson v. Milwaukee*, 50 Wis. 78; *O'Brien v. Penn. S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. Rep. 74; *Ogden v. City of Philadelphia*, 143 Pa. St. 430, 22 Atl. Rep. 694; *Jones v. Bangor*, 144 Pa. St. 638, 23 Atl. Rep. 252; *North Chester v. Eckfeldt*, 1 Monaghan, (Pa. Supm. Ct.) 732.

<sup>12</sup> *McCarthy v. St. Paul*, 22 Minn. 527; *Matter of Change of Grade of 5th and 6th sts.*, 12 Phila. 587; *Kershaw v. Philadelphia*, 20 Phila. 318; *Campbell v. Philadelphia*, 108 Pa. St. 300. See generally post § 667.

before the statute took effect but which was not executed until afterwards.<sup>13</sup> But the contrary would seem to be the better rule, and the one in harmony with the prevailing rule as to when the action accrues.<sup>14</sup>

§ 218g. **Elements and measure of damages.**—Where compensation is given generally for damages to abutting property by a change of grade, the measure of damages is the diminution in value, caused by the change.<sup>15</sup> If the property is not lessened in value there can be no recovery, though expense will have to be incurred in adjusting the property to the new grade.<sup>16</sup> There can be no recovery of nominal damages.<sup>17</sup> Interference with access, the cost of adjusting the property to the new grade, injury from surface water, and whatever affects the value of the property may be taken into consideration.<sup>18</sup> The statute may limit the right of compensation to improved property,<sup>19</sup> or to the buildings alone.<sup>20</sup>

§ 218h. **Estoppel to claim damages.**—The fact that an

<sup>13</sup> *Cotes v. Davenport*, 9 Ia. 227.

<sup>14</sup> *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. Rep. 146; S. C. 38 Ill. App. 133; and see cases cited in last section.

<sup>15</sup> *Platt v. Town of Milford*, 66 Conn. 320, 34 Atl. Rep. 82; *McCosh v. Burlington*, 72 Ia. 26; *Stewart v. Council Bluffs*, 84 Ia. 61, 50 N. W. Rep. 219; *Parker v. City of Atchison*, 46 Kan. 14, 26 Pac. Rep. 435; *Chase v. City of Portland*, 86 Me. 367, 29 Atl. Rep. 1104; *Woodbury v. Beverly*, 153 Mass. 245, 26 N. E. Rep. 851; *Dale v. City of St. Joseph*, 59 Mo. App. 566; *French v. Milwaukee*, 49 Wis. 584.

<sup>16</sup> *Hempstead v. Des Moines*, 52 Ia. 303.

<sup>17</sup> *Burkham v. Ohio & M. R. R. Co.*, 122 Ind. 344, 23 N. E. Rep. 799.

<sup>18</sup> *Shelton Co. v. Birmingham*,

62 Conn. 456, 26 Atl. Rep. 348; *Holley v. Torrington*, 63 Conn. 426, 28 Atl. Rep. 613; *Cook v. City of Ansonia*, 66 Conn. 413, 34 Atl. Rep. 183; *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 419; *Chase v. City of Portland*, 86 Me. 367, 29 Atl. Rep. 1104; *Woodbury v. Beverly*, 153 Mass. 245, 26 N. E. Rep. 851; *Church v. Milwaukee*, 34 Wis. 66; *Stadler v. Ibid.*, 34 Wis. 98; *Church v. Ibid.*, 31 Wis. 512; *Stowell v. Ibid.*, 31 Wis. 523; *French v. Ibid.*, 49 Wis. 584; *Tyson v. Ibid.*, 50 Wis. 78; post, § 494.

<sup>19</sup> *Conklin v. City of Keokuk*, 73 Ia. 343, 35 N. W. Rep. 444; *Chase v. Sioux City*, 86 Ia. 603, 53 N. W. Rep. 333.

<sup>20</sup> *People v. Gilon*, 76 Hun 346, 27 N. Y. Supp. 704.

abutter has dedicated or conveyed land for the street, or released any claim for damages in consequence of its establishment, does not estop him from claiming compensation for a change of grade.<sup>21</sup> Nor is the plaintiff estopped by the fact that he has done the work in front of his property in compliance with an order of the council,<sup>22</sup> nor by the fact that he has requested the completion of a change already begun.<sup>23</sup> Where a person builds to the natural grade after a different grade has been established, he cannot recover for damages caused by bringing the street to the established grade.<sup>24</sup> Where an abutter built on a ridge to the natural grade and the grade of the street was afterwards lowered, it was held he was not estopped to recover damages on the ground that he should have foreseen that a change would be necessary.<sup>25</sup>

§ 218i. **Miscellaneous questions.**—A statute was passed authorizing a city to make compensation for damages to abutting property by a change of grade and was afterward repealed. While the statute was in force and before a certain change was executed, the city promised to make compensation for such damages. It was held that the promise was binding.<sup>26</sup>

§ 219. **Statutes giving damages for railroads in streets.**—The code of Iowa, § 464, empowers cities to grant or forbid the laying of railroad tracks in streets, "but no railway track can thus be located and laid down until after the injury to the property abutting on the street, alley or public places upon which such railroad is proposed to be located

<sup>21</sup> Fernald v. Boston, 12 Cush. 574; Bartlett v. Tarrytown, 52 Hun, 380, 24 N. Y. St. 272, 5 N. Y. Supp. 240.

<sup>22</sup> Pearce v. Milwaukee, 18 Wis. 428.

<sup>23</sup> Herser v. Milwaukee, 39 Wis. 108; Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. Rep. 225; and see Luscombe v. Milwaukee, 36 Wis. 511. But where the property owner, after

an ordinance for a change of grade had been passed, petitioned for the making of the improvement, he was held to be estopped. Preston v. Cedar Rapids, 95 Ia. 71, 63 N. W. Rep. 577.

<sup>24</sup> Omaha v. Williams, 52 Neb. 40.

<sup>25</sup> McGar v. Bristol, 71 Conn. 652, 42 Atl. Rep. 1000.

<sup>26</sup> Healey v. New Haven, 49 Conn. 394.

has been ascertained and compensated" in the manner provided by law. This was held to apply as to any tracks laid after its passage, and that a recovery was not limited merely to damages from change of grade.<sup>27</sup> It was held not to apply to a horse railway,<sup>28</sup> nor to a railroad crossing a street.<sup>29</sup> But if the crossing is diagonal, so that any part of the track or embankment is opposite the plaintiff's lot,<sup>30</sup> or if the crossing is above or below grade, necessitating an approach in front of plaintiff's property,<sup>31</sup> there may be a recovery. No right can be acquired until the compensation has been ascertained and paid and a company laying down and using a track without making compensation, and its successors in title, are trespassers.<sup>32</sup> Where permission to lay a railroad in a street was granted upon condition of paying all damages to private property, it was held that only actionable damages were intended.<sup>33</sup> But where the condition was that the railroad company should pay all damages that might accrue to the property owners on the street by reason of the construction of the road, it was held that a recovery could be had, not only for the depreciation in value of the property, but also for interruption and damage to business during the progress of the work.<sup>34</sup> Where a statute provides that when tracks are laid upon a public street, the company shall be responsible for injuries done by such loca-

<sup>27</sup> *Drady v. D. M. & Ft. D. R. R. Co.*, 57 Ia. 393; *Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. R. Co.*, 70 Ia. 105.

<sup>28</sup> *Sears v. Marshalltown Street Ry. Co.*, 65 Ia. 742.

<sup>29</sup> *Morgan v. Des Moines & St. Louis Ry. Co.*, 64 Ia. 589. But see *New Castle & Franklin R. R. Co. v. McChesney*, 85 Pa. St. 522.

<sup>30</sup> *Enos v. Chicago etc. R. R. Co.*, 78 Ia. 28, 42 N. W. Rep. 575; *Gates v. Chicago etc. R. R. Co.*, 82 Ia. 518, 48 N. W. Rep. 1040. And see *Wead v. St. Johnsbury etc. R. R. Co.*, 64 Vt. 52, 24 Atl. Rep. 361.

<sup>31</sup> *Nicks v. Chicago etc. R. R. Co.*, 84 Ia. 27, 50 N. W. Rep. 222; *Hitchcock v. Chicago etc. R. R. Co.*, 88 Ia. 242, 55 N. W. Rep. 337.

<sup>32</sup> *Harbach v. Des Moines etc. R. R. Co.*, 80 Ia. 593, 44 N. W. Rep. 348, 1 Am. R. R. & Corp. Rep. 449.

<sup>33</sup> *Sargeant v. Ohio & Mississippi R. R. Co.*, 1 Handy, Ohio, 52; *Henderson Belt R. R. Co. v. Dechamp*, 95 Ky. 219, 24 S. W. Rep. 605.

<sup>34</sup> *St. Louis etc. R. R. Co. v. Capps*, 67 Ill. 607; *S. C. 72 Ill. 188*; *Same v. Haller*, 82 Ill. 203.

tion to private property lying upon or near the street, one whose property is situated a few feet beyond the terminus of the road is entitled to recover.<sup>35</sup> Under the provision of a street railway company's charter that "whenever any estate abutting on a street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby the said corporation shall be liable to pay the owner or owners thereof the damages thereby occasioned to said estate," damages can be recovered for injuries resulting from the laying of the rails only as distinguished from those resulting from the using of them as laid.<sup>36</sup> But unless limited by the statute the measure of damages is the depreciation in value caused by the construction and use of the tracks.<sup>37</sup> Abutters on both sides of the street may recover though the railroad is laid wholly on one side.<sup>38</sup> A statute giving compensation for damage caused by electric lines for the transmission of intelligence and in case of electric light and electric power lines and passed before electric railways were in common use, was held not to apply to the latter.<sup>39</sup>

<sup>35</sup> *Lake Roland El. R. R. Co. v. Webster*, 81 Md. 529, 32 Atl. Rep. 186. "The right to redress depends upon the question whether damage was done, and not on the proximity or distance of the operative cause of the injury." Under a similar statute property 300 feet away was held to be "near to" the street occupied. *Wheeling etc. R. R. Co. v. Laughlin*, 15 Ohio C. C. 1.

<sup>36</sup> *Vose v. Newport St. R. R. Co.*, 17 R. I. 134, 20 Atl. Rep. 267.

<sup>37</sup> *Nicks v. Chicago etc. R. R. Co.*, 84 Ia. 27, 50 N. W. Rep. 222; *Railway Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. Rep. 69; post, § 493. The following cases arose under such statutes, but involve questions that will be considered elsewhere: *Grand Rapids &*

*Indiana R. R. Co. v. Helsel*, 47 Mich. 393; *Pittsburg, Va. etc. R. Co. v. Rose*, 74 Pa. St. 362; *Grafton v. Baltimore & Ohio R. Co.*, 21 Fed. Rep. 309; *O'Brien v. Baltimore Belt R. R. Co.*, 74 Md. 363, 22 Atl. Rep. 141; *Onset St. R. R. Co. v. County Comrs.*, 154 Mass. 395, 28 N. E. Rep. 286; *Taylor v. Bay City St. R. R. Co.*, 80 Mich. 77, 45 N. W. Rep. 335; *Wead v. St. Johnsbury etc. R. R. Co.*, 64 Vt. 52, 24 Atl. Rep. 361; *Hodges v. Seaboard etc. R. R. Co.*, 88 Va. 653, 14 S. E. Rep. 380; *Trustees v. Milwaukee etc. R. R. Co.*, 77 Wis. 158, 45 N. W. Rep. 1086.

<sup>38</sup> *Kuhl v. Chicago & N. W. R. R. Co.*, 101 Wis. 42.

<sup>39</sup> *McDermott v. Warren, etc.*

§ 220. **Statutes giving damages in other cases.**—The charter of a railroad company required it “to pay all damages that may arise to any person or persons.” This was held to embrace damages of every description, incidental and consequential, as well as direct, and to apply to those no part of whose land was taken as well as to those over whose land the road was laid.<sup>40</sup> Injury to a building by excavating on the adjoining lot, whereby the foundations were weakened,<sup>41</sup> also by raising the grade of the street in front, whereby access was impeded and water turned on the property,<sup>42</sup> were held to be within the statute. The charter of a gas and water company required it to make compensation for “any injury done to private property.” The court interpreted this as follows: “‘Private property’ necessarily includes everything that can be held or owned by private persons and ‘injury’ any and every damage to which it can or may be subjected.”<sup>43</sup>

A statute of Massachusetts provided as follows: “Every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials as provided in the preceding section.”<sup>44</sup> The following cases of damage have been held to be within the statute: The draining of plaintiff’s well by a deep cut,<sup>45</sup> injury to plaintiff’s building by blasting,<sup>46</sup> and injury by raising the grade of the street in front of plaintiff’s property.<sup>47</sup> An important case arose out of the following facts: Plaintiff owned premises

R. R. Co., 172 Mass. 197, 51 N. E. Rep. 972.

<sup>40</sup> Bradley v. New York & New Haven R. R. Co., 21 Conn. 294.

<sup>41</sup> Same.

<sup>42</sup> Same; an’ Nicholson v. New York & New Haven R. R. Co., 22 Conn. 74; Burritt v. New Haven, 42 Conn. 174.

<sup>43</sup> Lycoming Gas & Water Co. v. Moyer, 99 Pa. St. 615.

<sup>44</sup> R. S. 1826, c. 39, § 56; R. S. 1882, c. 112, § 95.

<sup>45</sup> Parker v. Boston & Maine R. R. Co., 3 Cush. 107. To the same effect are Trowbridge v. Brookline, 144 Mass. 139, and Bickford v. Hyde Park, 173 Mass. 552, where a well was drained by a cut for a sewer, and the statute as to damages was similar.

<sup>46</sup> Dodge v. Commissioners of Essex, 3 Met. 380.

<sup>47</sup> Gardiner v. Boston & Worcester R. R. Co., 9 Cush. 1.



in Lowell abutting on Western avenue. A railroad company crossed the avenue near the plaintiff's premises, and between them and the center of the city. The track was several feet above the grade of the street, and on either side suitable approaches were made. The result of this was to cause numerous detentions to plaintiff, to impair the convenience of the road, and to depreciate the value of plaintiff's property. No part of the plaintiff's property was taken. The court held that the plaintiff was not entitled to damages.<sup>48</sup> It is difficult to reconcile this case with an earlier one in the same court. A corporation was authorized to erect dams on a stream, by a statute which provided that any person "sustaining any damage to his land" by reason thereof might obtain compensation. The plaintiff had a soap and candle mill on the stream. The dam cut off his water communication with Boston, whereby transportation was rendered more expensive. It was held that he could recover.<sup>49</sup> In the former case there was an interference with a highway by land, in the latter an interference with a highway by water. In both cases the interference caused a depreciation of the plaintiff's property. In neither case was any part of the plaintiff's property taken.

Under a statute which provided for the payment of "all damages that shall be sustained by any persons in their property \* \* \* by the construction of any aqueducts, etc., for the purpose of the act," it was held an injury by transporting materials over land was embraced by the act and the remedy provided by the act was exclusive.<sup>50</sup> But a statute giving damages for property taken or affected by a public work does not cover damages by negligence or unskilfulness.<sup>51</sup> An act which provides that the mayor and aldermen of a city shall have power to ascertain any damage done to property by a certain improvement, and to provide for payment of the same, imposes an imperative duty

<sup>48</sup> Proprietor of Locks and Canals v. Nashau & Lowell R. Co., 10 Cush. 385.

<sup>50</sup> Tower v. Boston, 10 Cush. 235.

<sup>49</sup> Boston & Roxbury Mill Corporation v. Gardner, 2 Pick. 33.

<sup>51</sup> Bailey v. Mayor etc. of New York, 3 Hill, 531.

and vests a right of action in the owner of property so injured, whether the city makes such provision or not.<sup>52</sup> In Pennsylvania it has been held that an act requiring compensation for any injury or damage to private property by particular works includes all damages, consequential and remote.<sup>53</sup> Under an act which provides for an assessment of damages sustained by reason of any excavation or embankment made in the construction of a railroad, proceedings cannot be had to assess damages for an additional track in a street.<sup>54</sup> Under an act giving compensation "to all parties interested for all damages by them sustained by reason of the exercise of such powers," it was held that damage to goods could be recovered.<sup>55</sup> Where a canal was abandoned

<sup>52</sup> *Gregg v. Mayor etc. of Baltimore*, 56 Md. 256.

<sup>53</sup> *Buckwalter v. Black Rock Bridge Co.*, 38 Pa. St. 281; *Watson v. Pittsburgh & Connellsville R. R. Co.*, 37 Pa. St. 469; *Miffin v. Railroad Co.*, 16 Pa. St. 182; see also *Coster v. Albany*, 52 Barb. 276. In the following case it was held that legal injury only is intended; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71. Where a canal was transferred by the State to a private company, who agreed to pay "any and all claims for damages or other demands against the commonwealth," the company was held bound to pay only such claims as the commonwealth would have been held liable for, and hence was held not liable for consequential damages. *Delaware Division Canal Co. v. McKeen*, 52 Pa. St. 117. Where a company was authorized to improve a stream and required to file a bond "sufficient to indemnify all persons holding property on said stream for any

loss by reason of said improvement," this was held not to enlarge the company's liability so as to make it responsible for consequential damages. *Woodward v. Webb*, 65 Pa. St. 254. But where a gas company gave a voluntary bond to pay the plaintiff "all damages of whatsoever nature or kind" that he might sustain by constructing or repairing pipe lines across certain described property, the language was held to cover consequential damages. *Pennsylvania Nat. Gas Co. v. Cook*, 123 Pa. St. 170, 16 Atl. Rep. 762. And see as in line with the text; *Commonwealth v. Snyder*, 2 Watts, 418; *Boston Belting Co. v. City of Boston*, 152 Mass. 307, 25 N. E. Rep. 613.

<sup>54</sup> *Cumberland Valley R. R. Co. v. Rhoadarmer*, 107 Pa. St. 214.

<sup>55</sup> *Knock v. Metropolitan Railway Co.*, 4 L. R. C. P. 131; 38 L. J. C. P. 78. To same effect; *Jabb v. The Hull Dock Co.*, 9 A. & E. N. S. 443, 58 E. C. L. R. 441.

and granted to a city by the State upon condition that the city should "be liable for all damages which might accrue from the vacation of said canal," it was held the city would only be liable for such damages as would have been a legal claim against the State.<sup>56</sup> A statute authorizing a company to take land and material, for improving the navigation of a river, "being accountable to the owners thereof for all damages, if any," does not make the company liable for consequential damages, as by changing the current so as to wash away the plaintiff's banks.<sup>57</sup> Statutes giving damages for telephone poles and fixtures in a street,<sup>58</sup> for a public urinal in a street,<sup>59</sup> and for the vacation of a highway,<sup>60</sup> are cited in the margin. A navigation company was made liable for consequential damages to property situated on either side of its improvements. This was held to refer to contiguous property and not to property situated some ways below a dam and injured thereby.<sup>61</sup> A statute of Massachusetts authorized the State Board of Agriculture to take measures for the extermination of the gypsy moth, and to enter upon lands for that purpose, and provided that "the owner of any land so entered upon, who should suffer damage by such entry and acts done thereon" by the board, might recover therefor from the city or town in which the land was situated. This was held not to extend to personal property on the land, such as cord wood, and that there could be no recovery under the statute for its destruction.<sup>62</sup>

## II.—IN CONSTITUTIONS.

§ 221. **Constitutional provisions.**—When the people of Illinois revised their constitution in 1870, they introduced an important change into the provision respecting the power

<sup>56</sup> *Hubbard v. City of Toledo*, 21 Ohio St. 379.

<sup>57</sup> *Brooks v. Cedar Brook etc. Imp. Co.*, 82 Me. 17, 19 Atl. Rep. 87.

<sup>58</sup> *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690.

<sup>59</sup> *Badger v. Boston*, 130 Mass. 170.

<sup>60</sup> *Brandenburg v. Hittel*, (Ind.) 37 N. E. Rep. 329.

<sup>61</sup> *Ihmsen v. Monongahela Nav. Co.*, 32 Pa. St. 153.

<sup>62</sup> *Globe Fire Ins. Co. v. Lexington*, 173 Mass. 6.

of eminent domain. The provision reads as follows: "Private property shall not be taken or *damaged* for public use without just compensation."<sup>63</sup> Nearly every other State which has revised its constitution since 1870 has followed the example set by Illinois by adding the word *damaged*, or its equivalent, to the provision in question.<sup>64</sup> Prior to 1870, as appears from the preceding sections, statutes had been passed in many of the States giving compensation for property damaged or injured in particular cases or for particular public uses. These statutes related mostly to the change of street grades. In England, since 1845, compensation has been allowed by act of Parliament for property "injuriously affected" by the construction of public works.<sup>65</sup> The proper meaning of the words *damaged* or *injured* in these late constitutions is now to be considered.

§ 222. The terms "*damaged*," "*injured*" and "*injuriously affected*" are synonymous.—The legal profession are familiar with a distinction between *damage* and *injury*. *Damnum absque injuria* has been the answer to many a

<sup>63</sup> Art. II, § 13.

<sup>64</sup> "Taken or damaged." Illinois, art. II, § 13, 1870; West Virginia, art. III, § 9, 1872; Missouri, art. I, § 20, 1875; Nebraska, art. I, § 21, 1875; Colorado, art. II, § 14, 1876; California, art. I, § 14, 1879; Louisiana, art. 156, 1879; Mississippi, art. III, § 17, 1890; Montana, art. III, § 14, 1889; North Dakota, art. I, § 4, 1889; South Dakota, art. VI, § 13, 1889; Utah, art. I, § 22, 1895; Washington, art. I, § 16; Wyoming, art. I, § 32. "Taken, injured or destroyed." Kentucky, § 242, 1891. "Taken, appropriated or damaged." Arkansas, art. II, § 22, 1874. "Taken, damaged or destroyed." Texas, art. I, § 17, 1876. In the new constitution of Pennsylvania, adopted in 1873, a provision was inserted

as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property *taken, injured or destroyed* by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction." Art. I, § 8. The new constitution of Alabama adopted in 1875 contains the same provision. Art. XIII, § 7. In both States the general provision as to taking remains. The exceptions are Florida, Idaho, New York and North Carolina.

<sup>65</sup> Land Clauses Consolidation Act, § 68.

lawsuit, which, being interpreted, means that there may be damage or loss without any violation of legal right. In common usage, however, these words are practically synonymous. Webster defines damage as "any hurt, injury or harm to one's estate;" and injury he defines as "any wrong or damage done to a man's person, rights, reputation or goods." The people of Pennsylvania, when they said that private property should not be *injured* for public use without compensation, undoubtedly understood and intended the same thing as the people of Illinois, who said that it should not be *damaged* for public use without compensation. The evil to be remedied was the same in both States. In England the word *damaged*, in a statute providing compensation for land damaged, was held equivalent to the words injuriously affected and given the same construction.<sup>66</sup> Likewise the words *all damages*, in a similar statute.<sup>67</sup> So also the word *injured*.<sup>68</sup> The word *injured*, in a New Jersey statute, was construed by the courts of that State to mean the same as the words *injuriously affected*, in the English statute.<sup>69</sup> So of the word *damaged* in the constitution of Colorado.<sup>70</sup> The Supreme Court of Georgia, referring to the words damaged, injured and injuriously affected, says: "All these terms are believed to be equivalent in meaning and extent."<sup>71</sup> And the Supreme Court of Washington, speaking of these words in recent constitution, says that, though the constitutions differ slightly in phraseology, "their substance is exactly the same."<sup>72</sup>

<sup>66</sup> Hall v. Mayor of Bristol, L. R. 2 C. P. 322; see also Ripley v. Great Northern Ry. Co., L. R. 10 Ch. App. 435.

<sup>67</sup> East & West India Docks etc. Co. v. Gattke, 3 McN. & G. 155; New River Co. v. Johnson, 2 E. & E. 435; S. C. 105 E. C. L. R. 434.

<sup>68</sup> Rickett's Case, 2 Eng. & Irish App. 193.

<sup>69</sup> Columbia Delaware Bridge Co. v. Gelsse, 35 N. J. L. 558.

<sup>70</sup> Town of Longmont v. Park-

er, 14 Col. 386, 23 Pac. Rep. 443, 2 Am. R. R. & Corp. Rep. 91. "In those cases the words are 'injuriously affected,' which are certainly in meaning and intention the same as the word 'damaged' in our constitution."

<sup>71</sup> Peel v. Atlanta, 85 Ga. 138, 11 S. E. Rep. 582, 2 Am. R. R. & Corp. Rep. 413.

<sup>72</sup> Brown v. City of Seattle, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64.

§ 223. **Damages from change of grade.**—All damage resulting to abutting property, by reason of lowering or raising the street in front of it, is within the constitutional provisions in question, and compensation must be made therefor.<sup>73</sup> It is immaterial whether the whole surface of the

<sup>73</sup> *Montgomery v. Townsend*, 80 Ala. 489; *S. C.* 84 Ala. 478, 4 So. Rep. 780; *Winter v. City Council*, 83 Ala. 589; *City Council of Montgomery v. Maddox*, 59 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426; *Town of Avondale v. McFarland*, 101 Ala. 381, 13 So. Rep. 504; *Rear-don v. San Francisco*, 66 Cal. 492; *De Long v. Warren*, (Cal.) 36 Pac. Rep. 1009; *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 611; *Castlebury v. Atlanta*, 74 Ga. 164; *Atlanta v. Wood*, 78 Ga. 276; *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. Rep. 692; *Smith v. Floyd County*, 85 Ga. 422, 11 S. E. Rep. 850; *City Council of Augusta v. Schrameck*, 96 Ga. 426, 23 S. E. Rep. 400; *Pekin v. Drereton*, 67 Ill. 477; *Bloomington v. Brokaw*, 77 Ill. 194; *Pekin v. Winkel*, 77 Ill. 56; *Elgin v. Eaton*, 83 Ill. 535; *S. C.* 2 Ill. App. 90; *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52; *Tinker v. City of Rockford*, 137 Ill. 123, 27 N. E. Rep. 74; *Tinker v. City of Rockford*, (Ill.) 28 N. E. Rep. 573; *Hohman v. City of Chicago*, 140 Ill. 226, 29 N. E. Rep. 671; *City of Bloomington v. Pollack*, 141 Ill. 346, 31 N. E. Rep. 146; *City of Joliet v. Blower*, 155 Ill. 414, 40 N. E.

Rep. 619; *City of Elgin v. McCullum*, 30 Ill. App. 416; *Osgood v. Chicago*, 44 Ill. App. 532; *City of Springfield v. Griffith*, 46 Ill. App. 246; *City of Savanna v. Loop*, 47 Ill. App. 214; *City of Joliet v. Blower*, 49 Ill. App. 464; *Hermann v. City of East St. Louis*, 58 Ill. App. 166; *Hopkins v. City of Ottawa*, 59 Ill. App. 238; *North Alton v. Dorsett*, 59 Ill. App. 612; *City of Vicksburg v. Herman*, 72 Miss. 211, 16 So. Rep. 434; *Werth v. Springfield*, 78 Mo. 107; *Householder v. City of Kansas City*, 83 Mo. 488; *Davis v. Mo. Pac. R. R. Co.*, 119 Mo. 180, 24 S. W. Rep. 77, 9 Am. R. R. & Corp. Rep. 117; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. Rep. 225; *Spencer v. Met. St. R. R. Co.*, 120 Mo. 154, 23 S. W. Rep. 126; *Clinkingbeard v. City of St. Joseph*, 122 Mo. 641, 27 S. W. Rep. 521; *Smith v. City of St. Joseph*, 122 Mo. 643, 27 S. W. Rep. 344; *Smith v. City of Kansas City*, 128 Mo. 23, 30 S. W. Rep. 314; *Imber v. City of Springfield*, 30 Mo. App. 669; *Carson v. City of Springfield*, 53 Mo. App. 239; *Schaller v. City of Omaha*, 23 Neb. 325, 36 N. W. Rep. 533; *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. Rep. 721; *Hammond v. City of Harvard*, 31 Neb. 635, 48 Neb. 462; *Lowe v. Omaha*, 33

street is raised or lowered or only a part of it, as where a causeway is built in the middle,<sup>74</sup> or an embankment on one

Neb. 587, 50 N. W. Rep. 760; Fremont etc. R. R. Co. v. Set-right, 34 Neb. 253, 51 N. W. Rep. 833; Svanson v. City of Omaha, 38 Neb. 550, 57 N. W. Rep. 289; Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. Rep. 754; New Brighton v. United Presbyterian Church, 96 Pa. St. 331; Pusey v. Allegheny, 98 Pa. St. 522; New Brighton v. Peirsol, 107 Pa. St. 280; O'Brien v. Penn. S. V. R. R. Co., 119 Pa. St. 184, 13 Atl. Rep. 74; Ogden v. City of Philadelphia, 143 Pa. St. 430, 22 Atl. Rep. 694; O'Brien v. City of Philadelphia, 150 Pa. St. 589, 24 Atl. Rep. 1047; Mellor v. City of Philadelphia, 160 Pa. St. 614, 28 Atl. Rep. 991; Brady v. Wilkesbarre, 161 Pa. St. 246, 28 Atl. Rep. 1085; City of Philadelphia v. Rudderow, 166 Pa. St. 241, 31 Atl. Rep. 53; Lewis v. Borough of Darby, 166 Pa. St. 613, 31 Atl. Rep. 335; Seaman v. Borough of Washington, 172 Pa. St. 467, 33 Atl. Rep. 756; Norristown's Appeal, 3 Walker's Pa. Supm. Ct. 146; In re Levering street, 14 Phil. 349; In re Germantown ave., 14 Phil. 351; Lloyd v. Philadelphia, 17 Phil. 202; Wilkesbarre Paper Mfg. Co. v. Wilkesbarre, 5 Luzerne Leg. Reg. Rep. 333; City of Ft. Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. Rep. 1059; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64; Johnson v. Parkersburg, 16 W. Va. 402; Hutchinson v. Parkersburg, 25 W. Va. 226; Chicago v. Taylor, 125 U.

S. 161; McElroy v. Kansas City, 21 Fed. Rep. 257; Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep. 415; Blanchard v. City of Kansas, 5 McCrary, 217; Harvard v. Cranch, 47 Neb. 133, 66 N. W. Rep. 276; Douglas County v. Taylor, 50 Neb. 535; San Antonio v. Mullaly, 11 Tex. Civ. App. 596, 33 S. W. Rep. 256; Texarkana v. Talbot, 7 Tex. Civ. App. 202, 26 S. W. Rep. 451; Bancroft v. San Diego, 120 Cal. 422; Walker v. Sedalia, 74 Mo. App. 70; Hampton v. Kansas City, 74 Mo. App. 129; In re Chatham st., 191 Pa. St. 604, 43 Atl. Rep. 365; Searle v. Lead, 10 S. D. 312; Blair v. Charleston, 43 W. Va. 62; Queen v. Vestry of St. Luke's etc., L. R. 6 Q. B. 572; S. C. 7 L. R. Q. B. 148; Queen v. The Wallasey Local Board of Health, L. R. 4 Q. B. 351; Queen v. Eastern Counties Ry. Co., 2 A. & E. n. s. 347; S. C. 42 E. C. L. R. 706; Adams v. Toronto, 12 Ontario, 243; Yeomans v. Wellington, 4 U. C. App. 301; Pratt v. City of Stratford, 16 U. C. App. 5; Moore v. Great Southern etc. R. R. Co., 10 Irish C. L. R. 46; Tuohy v. Same, 10 Irish, C. L. R. 98.

<sup>74</sup> Eachus v. Los Angeles Consolidated Electric R. R. Co., 193 Cal. 614, 37 Pac. Rep. 750; Chouteau v. St. Louis, 8 Mo. App. 48; see also the following cases under statutes, but involving the same principle: Stickford v. St. Louis, 7 Mo. App. 217; affirmed in 75 Mo. 309; Dore v. Milwaukee, 42 Wis. 108.

side,<sup>75</sup> or the sidewalk only is raised or lowered.<sup>76</sup> Where a street is opened and graded in one proceeding, compensation should be assessed both for the taking and the grading.<sup>77</sup> But, where a change is made from the natural grade after a street is opened, compensation must be made for the change.<sup>78</sup> One who buys property on a street after a grade

<sup>75</sup> *Shawneetown v. Mason*, 82 Ill. 337.

<sup>76</sup> *City Council of Montgomery v. Maddox*, 89 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426. And see next section.

<sup>77</sup> *Pusey v. Allegheny*, 98 Pa. St. 522.

<sup>78</sup> *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *City of Bloomington v. Pollack*, 141 Ill. 351, 31 N. E. Rep. 146; *City of Elgin v. Eaton*, 83 Ill. 535; *Davis v. Missouri Pac. R. R. Co.*, 119 Mo. 150, 24 S. W. Rep. 777, 9 Am. R. R. & Corp. Rep. 117; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. Rep. 225; *Smith v. St. Joseph*, 122 Mo. 643, 27 S. W. Rep. 344; *New Brighton v. United Presbyterian Church*, 96 Pa. St. 331; *Hendrick's Appeal*, 103 Pa. St. 358; *Jones v. Bangor*, 144 Pa. St. 638, 23 Atl. Rep. 252; *O'Brien v. City of Philadelphia*, 150 Pa. St. 589, 24 Atl. Rep. 1047; *Winner v. Graner*, 173 Pa. St. 43, 33 Atl. Rep. 698; *Norristown's Appeal*, 3 Walker's Pa. Supm. Ct. 146; *Wilkesbarre Paper Mfg. Co. v. Wilkesbarre*, 5 Luzerne Legal Reg. Rep. 333; *City of Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. Rep. 1059. In first case cited the court says: "The same rule is applicable when a street is for the first time reduced to an established

grade as when a change in the grade has been made after the street has once been brought to such grade. The suggestion that, when the owner dedicates his land for a street, it is with the understanding and consent on his part, binding also upon his grantees, that it will be subsequently fitted for use by grading, applies with as much force to any subsequent change in the established grade as to the first establishment of a grade. The power of the city to determine the grade is not exhausted with its first exercise, and the dedication by the owner must be deemed to have been made with a knowledge of this principle as much as with a consent to the establishment of any grade. The purchaser of a city lot fronting upon a street takes it subject to a right in the public to make the street available for the enjoyment of the easement therein for which the street was originally dedicated; but we are not aware that it has ever been held, where the foregoing constitutional provision prevailed, that the public had a right to establish any grade it might choose, irrespective of the damage such owner might sustain. This right to establish a grade in the street is attended with the corresponding obligation im-



has been established should improve with reference to the established grade and not with reference to the natural grade. And where, in such a case, the purchaser improved with reference to the natural grade, and the city afterwards cut down the street three feet to the established grade, it was held that no recovery could be had.<sup>79</sup> And generally if improvements are put upon property after a grade has been established, no damages can be recovered for injury to such improvements by bringing the street to the grade so established.<sup>80</sup> The constitution does not apply to a

posed by the constitution to make compensation for any damage to the private property which may be caused by the public in its exercise of the right. It may be conceded that the dedication of a street carries with it the right to make such a reasonable grade as will adapt it for use, for in such a case the grading of the street would have the effect to increase rather than to diminish the value of the lots adjacent thereto by making them accessible to the public; but, if the municipality deems it desirable to establish such a grade as will cause a damage rather than a benefit to the lots, the owner is entitled to compensation for the amount of this damage. The establishment of the grade is for the benefit of the public rather than of the adjacent owner, and if, in establishing such grade, the owner suffers damage, his property has been damaged 'for public use.' "

<sup>79</sup> *Denver v. Vernia*, 8 Col. 399.

<sup>80</sup> *Davis v. Mo. Pac. R. R. Co.*, 119 Mo. 180, 24 S. W. Rep. 777, 9 Am. R. R. & Corp. Rep. 117; *Blair v. Charleston*, 43 W. Va.

62; *Clinkingbeard v. St. Joseph*, 122 Mo. 641, 27 S. W. Rep. 521; *Axford v. Philadelphia*, 13 Phila. 483. Compare *Nolte v. Cincinnati*, 3 Ohio C. C. 503. In this case it was held, that if the work of bringing a street to an established grade was not done in a reasonable time, property owners might consider the grade abandoned, and improve their property with reference to the existing grade, and recover damages to such improvements if the change was afterwards made. The court says: "To say that, in a large city, where property is of so great value, and taxes high, the city can by a mere paper ordinance, fix a grade which may require heavy cuts and fills to be made, and keep back any improvement according to the grade for a great many years, and prevent the abutting proprietor from making any improvements on his property except according to such grade, and which improvement may be entirely inaccessible until the grade is made, and which the city may never carry out, seems to us as sacrificing the interests of property holders in a

change of grade made prior to its adoption,<sup>81</sup> but it is no bar to a recovery that the change was ordered or the grade established prior to the adoption of the constitution, if the actual change was not made until afterwards.<sup>82</sup> If a change of grade is made without the authority of the city, it will not be liable for damages resulting therefrom,<sup>83</sup> but a grade not legally established may be ratified and adopted so as to bind the city.<sup>84</sup> The fact that a change of grade was made by a city to enable it to construct a system of sewers calculated to abate a nuisance, does not affect the right to compensation.<sup>85</sup> Where a change of grade damaged lots on an intersecting street by preventing the flow of surface water therefrom, it was held that the owner could recover.<sup>86</sup>

§ 223a. Viaducts, tunnels, causeways, bridge approaches and the like in streets.—The construction of viaducts, bridges and tunnels and approaches thereto, for the purpose of carrying streets over or under railroad tracks, streams or other obstructions, though often of great public utility, is frequently attended with great damage to property abutting on such improvements. All such damage is within the constitution and may be recovered.<sup>87</sup> Such improvements

manner the spirit of our law does not warrant," p. 507.

<sup>81</sup> *Folkenson v. Easton Borough*, 116 Pa. St. 523.

<sup>82</sup> *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. Rep. 146; *Echus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Ogden v. City of Philadelphia*, 143 Pa. St. 430, 22 Atl. Rep. 694. Compare *Chicago v. Rumsey*, 87 Ill. 348; *In re Plan 166*, 143 Pa. St. 414, 22 Atl. Rep. 669.

<sup>83</sup> *Werth v. Springfield*, 22 Mo. App. 12; and see *Valle v. City of Independence*, 116 Mo. 333, 22 S. W. Rep. 695; *Huckestein v. City of Allegheny*, 165 Pa. St. 367, 30 Atl. Rep. 982.

<sup>84</sup> *Imler v. City of Springfield*, 30 Mo. App. 669.

<sup>85</sup> *City of Philadelphia v. Rudderow*, 166 Pa. St. 241, 31 Atl. Rep. 53.

<sup>86</sup> *In re Chatham street*, 191 Pa. St. 604, 43 Atl. Rep. 365.

<sup>87</sup> *City of Pueblo v. Strait*, 20 Col. 13, 36 Pac. Rep. 790; *Smith v. Floyd County*, 85 Ga. 422, 11 S. E. Rep. 850; *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. Rep. 1013; *Pause v. Atlanta*, 98 Ga. 92; *Stack v. East St. Louis*, 85 Ill. 377; *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52; *Tinker v. City of Rockford*, 137 Ill. 123, 27 N. E. Rep. 74; *Tinker v. City of Rockford*, (Ill.)

stand upon the same footing as a change of grade.<sup>88</sup> So a recovery may be had where the grade of a street is raised for the purpose of forming a levee,<sup>89</sup> or where an approach to a bridge is built therein which affects the abutting property by impeding access and by the dust, noise and jarring caused by traffic on the same.<sup>90</sup>

§ 224. **Decisions in Alabama and Pennsylvania.** What constitutes a construction or enlargement of works, highways or improvements.—These States have a limited extension of the right to damages, requiring municipal and other corporations and individuals invested with the power of eminent domain to make compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements.<sup>91</sup> In Pennsylvania the question as to what constitutes a construction or enlargement of a street or highway does not appear to have been discussed. Suits for damages arising from a change of grade, whether from a natural grade or an established grade have uniformly been upheld,<sup>92</sup> and a liberal construction of

28 N. E. Rep. 573; *Hohman v. City of Chicago*, 140 Ill. 226, 29 N. E. Rep. 671; *Hermann v. City of East St. Louis*, 58 Ill. App. 166; *Spencer v. Metropolitan St. R. R. Co.*, 120 Mo. 154, 23 S. W. Rep. 126; *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295; *Fremont etc. R. R. Co. v. Setright*, 34 Neb. 253, 51 N. W. Rep. 833; *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577; *Brower v. County of Chester*, 1 Pa. Co. Ct. 1; *Beaver v. City of Harrisburg*, 156 Pa. St. 547, 27 Atl. Rep. 4; *Case v. Pennsylvania Co.*, 159 Pa. St. 273, 28 Atl. Rep. 161; *Chicago v. Taylor*, 125 U. S. 161. And see *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Shano v. Bridge Co.* 189 Pa. St. 245; 42 Atl. 128;

In re *Walnut St. Bridge*, 191 Pa. St. 153, 43 Atl. Rep. 88. In *Chicago v. Rumsey*, 87 Ill. 348, suit was brought for damages to property abutting on the open approach to a tunnel under the Chicago river. A recovery was denied because the ordinance was passed, the contracts let and the work commenced, before the new constitution took effect. And see *Souch v. East London Ry. Co.*, 42 L. J. 477.

<sup>88</sup> See ante, § 100b.

<sup>89</sup> *Shawneetown v. Mason*, 82 Ill. 337; *Beckett v. Midland Ry. Co.*, 1 L. R. C. P. 241; S. C. 3 L. R. C. P. 32.

<sup>90</sup> *Stack v. East St. Louis*, 85 Ill. 377.

<sup>91</sup> Ante, §§ 15, 44.

<sup>92</sup> *New Brighton v. United Presbyterian Church*, 96 Pa. St.

the constitution has been favored.<sup>93</sup> The purport of the decisions is that any change of grade is within the provision in question. A different view was at first taken in Alabama but has since been repudiated. In *City Council of Montgomery v. Townsend*,<sup>94</sup> it was held that it was not every change of grade that could be considered a "construction" or "enlargement" of a street or highway, but only such as could not have been reasonably and fairly foreseen at the time of the original establishment of the street or highway.<sup>95</sup>

331; *Pusey v. Allegheny*, 98 Pa. St. 522; *Hendrick's Appeal*, 103 Pa. St. 358; *New Brighton v. Piersol*, 107 Pa. St. 280; *O'Brien v. Penn. S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. Rep. 74; *Ogden v. City of Philadelphia*, 143 Pa. St. 430, 22 Atl. Rep. 694; *O'Brien v. City of Philadelphia*, 150 Pa. St. 539, 24 Atl. Rep. 1047; *Mellor v. City of Philadelphia*, 160 Pa. St. 614, 28 Atl. Rep. 991; *Brady v. Wilkesbarre*, 161 Pa. St. 246, 28 Atl. Rep. 1085; *City of Philadelphia v. Rudderow*, 166 Pa. St. 241, 31 Atl. Rep. 53; *Lewis v. Borough of Darby*, 166 Pa. St. 613, 31 Atl. Rep. 335; *Seaman v. Washington*, 172 Pa. St. 467, 33 Atl. Rep. 756; *Norristown's Appeal*, 3 Walker's Pa. Supm. Ct. 146; *In re Levering St.*, 14 Phil. 349; *Lloyd v. Philadelphia*, 17 Phil. 202; *Wilkesbarre Paper Mfg. Co. v. Wilkesbarre*, 5 Luzerne Leg. Reg. Rep. 333.

<sup>93</sup> *New Brighton v. United Presbyterian Church*, 96 Pa. St. 331; *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577.

<sup>94</sup> 80 Ala. 489, 2 So. Rep. 155; 84 Ala. 478, 4 So. Rep. 780.

<sup>95</sup> In *City Council of Montgomery v. Townsend*, 84 Ala. 478,

482, 4 So. Rep. 780, it is said: "A material change, operating injuriously to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or, made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury in the enlarged sense of the constitution, which casts upon the property owner an additional burden, entitling him to compensation." It is not every change operating an increase of convenience which falls within this rule. Changes generally have for their object increase of convenience. This power may be exercised completely at one time, or, on several occasions, as circumstances may suggest; and it authorizes the municipality to so alter the grade or surface of the streets, as to make them useful, convenient and safe for travel and transportation, as the same may be likely to be in request generally, or on the particular street. To come within the clause of the constitution we are discussing,

In *City Council of Montgomery v. Maddox*,<sup>96</sup> Somerville, J., in delivering the opinion of the court, expressed himself as follows: "I have no difficulty, for myself, in reaching the conclusion that, under the provisions of our present constitution, if the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of a street, in the mode exhibited by the evidence in this case, and this grading is done by the authority of the municipality, and by reason of this improvement the pecuniary value of the property is diminished, the owner is entitled to be compensated for the damages he has sustained. This rule has the advantage of being plain in meaning, and of easy application in practice. It harmonizes, moreover, in policy with that distinguishing feature of modern republican constitutions which has in view the protection of private rights and personal liberty, against the unjust oppression and encroachments of governmental power; and the measure of damages in such cases will be the decrease in the actual value of the property occasioned by the improvement thus

the change, alteration or improvement must go beyond this. It must be the result of a contingency not likely to be foreseen, or anticipated, or must be an increasing convenience above the ordinary standard of 'useful, convenient and safe,' or, must be made for ornamentation or for the purpose of improving the general appearance of the street. We have thus attempted to define, as well as we can, the two classes of street alteration or improvement. The power to make such as fall within the one class, is conclusively presumed to have been conferred by the act of dedication, or by the judgment of condemnation. In fact, it is so generally conferred, that it may almost be said to be inherent in municipal

organization. For the proper exercise of this power, the attinent property holder, though injured, is without redress. For injury suffered from the other, he is entitled to compensation under the new provision of our constitution of 1875. But whether the case falls within the one class or the other, must depend on so many phases and shadings of fact, that it can rarely, if ever, become a question of law. Larger license must be allowed in a city than in a village, in a commercial center and crowded thoroughfare, than in an obscure off-street. Hence, it is a mixed question of law and fact, to be pronounced on by a jury under proper instructions."

<sup>96</sup> 89 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426.

made for the public benefit. Unless this construction be given the constitution, it will fail, in my opinion, to afford that just indemnity for the wrongs of the citizen which was intended to be accomplished by its framers; which was, I repeat, to require the public to bear the burden of municipal improvements of this nature made for the public benefit, and not to crush the private citizen by imposing upon him alone the entire damage which may have been caused to his property. Such an improvement seems to me to be a 'construction or enlargement' of a highway, within the meaning of the clause under consideration. And I do not see that any dedication of a street, however long ago it may have been made, could operate to withdraw the case from the operation of the law, in force at the time the improvement is made, which declares, in effect, that the municipality shall indemnify the citizen for any injury or damage to his property resulting from such improvement, equally with any injury or damage done him by the actual taking of such property. It can make no difference in the justice of the case if one's property is reduced to one-half its original value by an actual taking, or by indirectly covering up his premises with earth piled up at his doorstep in leveling a street or in digging down a sidewalk so as to render a ladder necessary for access to the place of his abode or his business." But the judges were equally divided on the question of adopting the views of Justice Somerville or adhering to the views expressed in Townsend's case. In the more recent case of *Town of Avondale v. McFarland*,<sup>97</sup> the majority of the court adopted the opinion of Justice Somerville in *Maddox's* case, and *Townsend's* case was overruled in so far as it conflicted with that opinion.

A county has been held to be a municipal corporation within the meaning of the constitution.<sup>98</sup>

§ 225. **Damages by railroads in streets.**—Where a railroad is laid down in a public street or alley, the abutting

<sup>97</sup> 101 Ala. 381, 13 So. Rep. 504.

647; 12 Atl. Rep. 577; *Delaware*

<sup>98</sup> *Brower v. County of Chester*, 1 Pa. Co. Ct. 1; *County of Chester v. Brower*, 117 Pa. St.

*County's Appeal*, 119 Pa. St. 159; 13 Atl. Rep. 62.

property is damaged within the meaning of the constitution, to the extent of the depreciation caused by the construction and operation of the road.<sup>1</sup> In Pennsylvania, where

<sup>1</sup> *Columbus & W. R. R. Co. v. Withrow*, 82 Ala. 190; *Alabama M. R. R. Co. v. Coskey*, 92 Ala. 254, 9 So. Rep. 202; *Highland Ave. & B. R. R. Co. v. Matthews*, 99 Ala. 24, 10 So. Rep. 267; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Mullin v. So. Pac. R. R. Co.*, 83 Cal. 240, 23 Pac. Rep. 264; *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Montgomery v. Santa Ana & W. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; *Denver v. Boyer*, 7 Col. 113, 2 Pac. Rep. 6; *Denver etc. R. R. Co. v. Schmitt*, 11 Col. 56; *Denver etc. R. R. Co. v. Bourne*, 11 Col. 59; *Denver etc. R. R. Co. v. Domke*, 11 Col. 247; *Union Pac. R. R. Co. v. Foley*, 19 Col. 280, 35 Pac. Rep. 542; *Union Pac. R. R. Co. v. Benson*, 19 Col. 285, 35 Pac. Rep. 544; *Colorado Mid. R. R. Co. v. Trevarthen*, 1 Col. App. 152, 27 Pac. Rep. 1012; *Denver etc. R. R. Co. v. Costes*, 1 Col. App. 336, 28 Pac. Rep. 1129; *Campbell v. Metropolitan St. R. R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078; *Fouche v. Rome St. R. R. Co.*, 84 Ga. 233, 10 S. E. Rep. 1046, 1 Am. R. R. & Corp. Rep. 188; *Ivey v. Georgia etc. R. R. Co.*, 84 Ga. 536, 11 S. E. Rep. 128; *Georgia etc. R. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. Rep. 352; *Brunswick & W. R. R. Co. v. Waycross*, 88 Ga. 68, 13 S. E. Rep. 835; *Harvey v. Georgia So. etc. R. R. Co.*, 90 Ga. 66, 15 S. E. Rep. 783; *Streyer v. Georgia etc.*

*R. R. Co.*, 90 Ga. 56, 15 S. E. Rep. 637; *Powell v. Macon etc. R. R. Co.*, 92 Ga. 209, 17 S. E. Rep. 1027; *Chicago & Western L. R. R. Co. v. Ayers*, 106 Ill. 511; *Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Reide*, 101 Ill. 157; *Chicago, M. & St. Paul Ry. Co. v. Hall*, 90 Ill. 42; *S. C. 8 Ill. App. 621*; *Mix v. La Fayette etc. R. R. Co.*, 67 Ill. 319; *Stetson v. Chicago & Evanston R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ill. 588; *Chicago & Pacific R. R. Co. v. Francis*, 70 Ill. 238; *Stone v. Fairbury etc. R. R. Co.*, 68 Ill. 394; *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160; *Penn Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. Rep. 138, 6 Am. R. R. & Corp. Rep. 407; *Chicago etc. R. R. Co. v. Wedel*, 144 Ill. 9, 32 N. E. Rep. 547; *Chicago & Western Indiana R. R. Co. v. Berg*, 10 Ill. App. 607; *Same v. George*, Id. 646; *Same v. Phillips*, Id. 648; *Chicago & Eastern Ill. R. R. Co. v. Loeb*, 8 Ill. App. 627; *Maltman v. Chicago etc. R. R. Co.*, 41 Ill. App. 229; *McCarty v. Chicago etc. R. R. Co.*, 34 Ill. App. 273; *Chicago etc. R. R. Co. v. Leach*, 41 Ill. App. 584; *Atchison etc. R. R. Co. v. Platt*, 53 Ill. App. 263; *Hepting v. New Orleans Pac. R. R. Co.*, 36 La. An. 898; *Griffin v. Shreveport etc. R. R. Co.*, 41 La. An. 808, 6 So. Rep. 624; *McMahan v. St. Louis etc. R. R. Co.*, 41 La. An. 827, 6 So. Rep. 640; *Alabama & V. R. R. Co. v. Bloom*, 71 Miss.

the constitution only gives compensation for property injured by the "construction or enlargement" of works or improvements,<sup>2</sup> it is held that compensation may be had for damages by the construction of railroads in streets, though not for damages caused by their operation, as by smoke, noise, cinders, etc.<sup>3</sup> But in *Pennsylvania S. V. R. Co. v.*

247, 15 So. Rep. 72; *Gottschalk v. C. & B. & Q. R. R. Co.*, 14 Neb. 550; *Omaha etc. R. R. Co. v. Rogers*, 16 Neb. 117; *Omaha Belt R. R. Co. v. McDermott*, 25 Neb. 717, 41 N. W. Rep. 648; *Omaha etc. R. R. Co. v. Janecek*, 30 Neb. 276, 46 N. W. Rep. 478; *Nebraska etc. R. R. Co. v. Scott*, 31 Neb. 571, 48 N. W. Rep. 390; *Chicago etc. R. R. Co. v. O'Conner*, 42 Neb. 90, 60 N. W. Rep. 326; *Jaynes v. Omaha St. R. R. Co.*, 53 Neb. 631, 74 N. W. Rep. 67; *Galveston etc. R. R. Co. v. Eddins*, 60 Tex. 656; *Same v. Bock*, 63 Tex. 245; *Same v. Fuller*, 63 Tex. 467; *Texas etc. R. R. Co. v. Goldberg*, 68 Tex. 685; *Lyles v. Texas etc. R. R. Co.*, 73 Tex. 95; *Morrow v. St. Louis etc. R. R. Co.*, 81 Tex. 405, 17 S. W. Rep. 44; *Williams v. Galveston etc. R. R. Co.*, 1 Tex. App. Civil Cas. 131; *Galveston etc. Ry. Co. v. Graves*, *Ibid.*, 301; *Belt Line St. Ry. Co. v. Crabtree*, 2 Tex. App. Civil Cas. p. 579; *Kaufman v. Tacoma etc. R. R. Co.*, 11 Wash. 632, 40 Pac. Rep. 637; *Arbens v. Wheeling & H. R. R. Co.*, 33 W. Va. 1, 10 S. E. Rep. 14; *Fox v. Baltimore & O. R. R. Co.*, 34 W. Va. 466, 12 S. E. Rep. 757; *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 438, 18 S. E. Rep. 604; *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75, 10 S. C. Rep. 34, 1 Am. R. & Corp. Rep. 15; *Hot Springs*

*R. R. Co. v. Williamson*, 136 U. S. 121, 10 S. C. Rep. 955; *Osborne v. Mo. Pac. R. R. Co.*, 147 U. S. 248, 13 S. C. Rep. 299; *Mollandin v. Union Pacific R. R. Co.*, 4 McCrary, 290; 14 Fed. Rep. 394; *Frankle v. Jackson*, 30 Fed. Rep. 398; *Osborne v. Mo. Pac. R. R. Co.*, 35 Fed. Rep. 84; *Jackson v. Chicago etc. R. R. Co.*, 41 Fed. Rep. 656; *Beckett v. Midland Ry. Co.*, 1 L. R. C. P. 241; *affirmed*, 3 L. R. C. P. 82; *Queen v. Eastern Counties Ry. Co.*, 2 A. & E. n. s. 347; 42 E. C. L. R. 706; *Harrocks v. Met. R. R. Co.*, 4 B. & S. 357, 116 E. C. L. R. 314.

<sup>2</sup> See ante, § 44.

<sup>3</sup> *Duncan v. Pennsylvania R. R. Co.*, 94 Pa. St. 435; 8 S. C. 13 Phil. 68; *Pennsylvania R. R. Co.'s Appeal*, 115 Pa. St. 514; *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. Rep. 871; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690; *Pennsylvania S. V. R. R. Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. Rep. 187; *Baltimore & C. V. R. R. Extension Co. v. Duke*, 129 Pa. St. 422, 18 Atl. Rep. 566; *Cass v. Pennsylvania Co.*, 159 Pa. St. 273, 28 Atl. Rep. 161; *Ryan v. Penn. S. V. R. R. Co.*; 2 Mont. Co. L. R. 31; *Quigley v. Penn. S. V. R. R. Co.*, 2 Mont. Co. L. R. 109; *O'Brien v. Penn. S. V. R. R. Co.*, 4 Mont. Co. L. R. 57. In *Beck v. Erie Terminal R. R. Co.*,



Walsh,<sup>4</sup> where a railroad was laid close to plaintiff's curb line, the court seems to hold that the interference with access by the passage of trains may be taken into account. In Missouri it is held that a railroad, laid so as to conform to the grade of the street, is not a taking or damaging of the abutting property within the meaning of the constitution, though such property is depreciated thereby.<sup>5</sup> But if the railroad is laid otherwise than upon the grade of the street, the abutter is entitled to compensation.<sup>6</sup> The same rule applies to street railways as to commercial railways, for the

11 Pa. Co. Ct. 363, it was held that abutters on the north side of a street were not entitled to damages for a railroad on the south half of the street, if they still had convenient access to their property. Compare *Shano v. Bridge Co.*, 189 Pa. St. 245, 42 Atl. Rep. 128.

<sup>4</sup> 124 Pa. St. 544, 17 Atl. Rep. 186, S. C. 5 Mont. Co. L. R. 57. The court says: "It was urged, however, that the mere laying down of the tracks in front of the plaintiff's property was not, of itself, an injury; that it was a benefit, in view of the fact that the street had been greatly improved by having been repaved with Belgian blocks in a superior manner; and the injury was the sole result of the use and operation of the road. This is plausible, but unsound. Where the question is the obstruction of access to property by the building of a railroad, it is impossible to separate the construction from the operation of the road. Such a doctrine would be a misapplication of the rule laid down in *Railroad Co. v. Marchant*, supra. It would be an unsavory technicality to hold

that a railroad laid down by the curb in front of a man's door, with trains constantly passing and repassing, did not interfere with his access to his house, and was not an injury caused by the construction of the road. No authority for such a proposition can be found in anything this court has ever said."

<sup>5</sup> *Henry Gauss & Sons Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 20 S. W. Rep. 658, 7 Am. R. R. & Corp. Rep. 235. This case is commented on somewhat in *Osborne v. Mo. Pac. R. R. Co.*, 147 U. S. 248, 13 S. C. Rep. 299, in a way that warrants the inference that the latter court regarded the former decision as erroneous.

<sup>6</sup> *Sheehy v. Kansas City Cable R. R. Co.*, 94 Mo. 574, 7 S. W. Rep. 579; *Smith v. Kansas City etc. R. R. Co.*, 98 Mo. 20, 11 S. W. Rep. 259; *Gates v. Kansas City etc. R. R. Co.*, 111 Mo. 28, 19 S. W. Rep. 957; *Brady v. Kansas City Cable R. R. Co.*, 111 Mo. 329, 19 S. W. Rep. 953; *Spencer v. Metropolitan St. R. R. Co.*, 120 Mo. 154, 23 S. W. Rep. 126; *Spencer v. Met. St. R. R. Co.*, 58 Mo. App. 513.

question does not depend upon what is a legitimate street use, but on whether the abutting property is damaged for public use.<sup>7</sup> But a distinction seems to be made in Pennsylvania and this may be justified by the peculiar provisions of the constitution of that State.<sup>8</sup> It is immaterial whether the fee of the street is in the public or in the adjoining owner.<sup>9</sup> So a recovery may be had for damages caused by laying an additional track in a street,<sup>10</sup> or by moving a track nearer the plaintiff's property.<sup>11</sup>

<sup>7</sup> *Campbell v. Metropolitan St. R. R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078; *Fouche v. Rome St. R. R. Co.*, 84 Ga. 233, 10 S. E. Rep. 726, 1 Am. R. R. & Corp. Rep. 188; *Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574, 7 S. W. Rep. 579; *Brady v. Kansas City Cable R. R. Co.*, 111 Mo. 329, 19 S. W. Rep. 953; *Spencer v. Met. St. R. R. Co.*, 58 Mo. App. 513; *Hot Springs R. R. Co. v. Williamson*, 136 U. S. 121, 10 S. C. Rep. 955.

<sup>8</sup> *Lockart v. Craig St. R. R. Co.*, 139 Pa. St. 419, 21 Atl. Rep. 26; S. C. 8 Pa. Co. Ct. 470; *Raferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. R. & Corp. Rep. 287; *Lockart v. Craig St. R. R. Co.*, 8 Pa. Co. Ct. 470; *Commonwealth v. West Chester*, 9 Pa. Co. Ct. 542; *Heilman v. Lebanon & A. R. R. Co.*, 10 Pa. Co. Ct. 241; *Dilly v. Wilkesbarre Pass. R. R. Co.*, 12 Pa. Co. Ct. 270; *Township of Mahoney v. Beaver Meadow etc. R. R. Co.*, 13 Pa. Co. Ct. 344; *Perry v. Wilkesbarre etc. Pass. R. R. Co.*, 4 Luzerne Leg. Reg. Rep. 519. But where a street railway was laid under an ordinance which made it liable for all damages to abutting property, it was held liable

for the diminution in the value of the property. *May v. Carbon-dale Traction Co.*, 167 Pa. St. 343, 31 Atl. Rep. 667. The constitution of Pennsylvania limits the liability for property injured but not taken to corporations and individuals "invested with the privilege of taking private property for public use." Ante, § 44. Street railway corporations are not usually vested with such power.

<sup>9</sup> *Denver v. Bayer*, 7 Col. 113; *Gottschalk v. C. B. & Q. R. R. Co.*, 14 Neb. 550; *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va., 438, 18 S. E. Rep. 604; ante, § 911.

<sup>10</sup> *Denver etc. R. R. Co. v. Domke*, 11 Col. 247; *Denver etc. R. R. Co. v. Costes*, 1 Col. App. 236, 28 Pac. Rep. 1129; *Pittsburgh etc. R. R. Co. v. Reich*, 101 Ill. 157; *McCarty v. C. B. & Q. R. R. Co.*, 34 Ill. App. 273; *Maltman vs. Chicago etc. R. R. Co.*, 41 Ill. App. 229; *Chicago etc. R. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. Rep. 326; *Northern Central R. R. Co. v. Holland*, 117 Pa. St. 613, 12 Atl. Rep. 575; *Dilley v. Wilkesbarre Pass. R. R. Co.*, 12 Pa. Co. Ct. 270.

<sup>11</sup> *Patent v. Phil. & Reading R. R. Co.*, 14 *WeaRley Notes*

§ 226. **Damages by other uses of streets.**—Damages resulting to abutting property by any improvement or use of streets for public purposes are undoubtedly within the constitution. Where a city erected a tank and steam engine in front of plaintiff's property, for the purpose of supplying water to its citizens, which caused smoke and cinders to be thrown upon his property and depreciated its value, it was held that he could recover.<sup>12</sup> So where the city placed a standpipe in the street near plaintiff's property.<sup>13</sup> If abutting property is injured by the construction of sewers or drains in the street,<sup>14</sup> or by ditches or canals for conveying water,<sup>15</sup> a recovery may be had. In Missouri the erection of telephone poles in a street is held not to come within the constitutional provision as to damage.<sup>16</sup> But we think this is clearly an error.<sup>17</sup> Where an abutter has built an area to afford light to his basement, under a revocable license from the city, the city may fill up the area and cut off the light, and the abutter will have no claim, as for property damaged, injured, or destroyed within the constitution.<sup>18</sup> In Pennsylvania it has been intimated but not decided that an abutter may have his action at law for any damages sustained by the laying of a gas main underneath the sidewalk adjacent to his property.<sup>19</sup>

§ 226a. **Damages by the vacation of streets.**—This subject has been quite fully considered in a former chapter,<sup>20</sup>

(Pa.) 545; *Maltman v. Chicago* etc. R. R. Co., 41 Ill. App. 229.

<sup>12</sup> *Morrison v. Hinkson*, 87 Ill. 587.

<sup>13</sup> *Barrows v. City of Syracuse*, 150 Ill. 538, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62.

<sup>14</sup> *Ladd v. City of Philadelphia*, 171 Pa. St. 485, 33 Atl. Rep. 62; *City of Plattsburgh v. Boeck*, 32 Neb. 297, 49 N. W. Rep. 167; *Stainton v. Metropolitan Board of Works*, 26 L. J. Ch. 300.

<sup>15</sup> *Town of Longmont v. Par-*

*ker*, 14 Col. 386, 23 Pac. Rep. 443, 2 Am. R. R. & Corp. Rep. 91; *Walley v. Platte & D. Ditch Co.*, 15 Col. 579, 26 Pac. Rep. 129.

<sup>16</sup> *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258.

<sup>17</sup> See ante, § 131.

<sup>18</sup> *Winter v. City Council*, 83 Ala. 589.

<sup>19</sup> *McDevitt v. People's Nat Gas Co.*, 160 Pa. St. 367, 28 Atl. Rep. 948.

<sup>20</sup> Ante, § 134.

though not with reference to the effect of the constitutional provisions now under consideration. But the authorities hold that an abutter is not entitled, by virtue of these provisions, to recover damages occasioned by the vacation of a street, or part of a street, if his property does not abut upon the part vacated, and he is not deprived of an outlet from his property.<sup>21</sup> Property which abuts on the vacated part or is deprived of an outlet is damaged within the constitution.<sup>22</sup>

§ 227. Impeding access to premises by interfering with public ways not in front of same.—We have already seen that if, by any authorized use or improvement of the street in front of property, access thereto is impeded or it is otherwise depreciated in value, the property is damaged and a recovery may be had. But it frequently happens that a public improvement on a street or public way affects the value of property which does not abut upon the improvement, and the question is whether in such case the property is damaged or injuriously affected. This question has received careful consideration both in England and the United States.

In the case of *McCarthy v. Metropolitan Board of Works*,<sup>23</sup> the plaintiff, McCarthy, resided and carried on business as a dealer in lime, brick, sand, ballast and other building materials on premises near a dock, known as Whitefriars' Dock, which was a public dock on the Thames. The dock was separated from plaintiff's premises by a public street twenty feet wide and the distance from this street to the river along the dock was 352 feet. The dock was largely used by the plaintiff in the way of his business, but he had

<sup>21</sup> *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. Rep. 743, 5 Am. R. R. & Corp. Rep. 192; *Bailey v. Culver*, 84 Mo. 531; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. Rep. 478; *In re Vacation of Howard Street*, 142 Pa. St. 601, 21 Atl. Rep. 974; *Hare v. Rice*, 142 Pa. St. 608, 21 Atl. Rep. 976; *In re Melon St.*, 1 Pa. Supr. 63.

*Compare Town of Lake v. Burky*, 57 Ill. App. 547. But see § 134.

<sup>22</sup> *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. Rep. 307.

<sup>23</sup> L. R. 7 C. P. 508; *affd.* in Exch. Chamber, L. R. 8 C. P. 191 (5 Moak's Rep. 256); *affd.* in House of Lords, L. R. 7 Eng. & Irish App. 243 (10 Moak's Rep. 1).

no right or easement in the dock other than as one of the public, nor was there appurtenant or otherwise belonging to his premises any other right or privilege in or to the dock. By reason of its proximity to the plaintiff's premises, and the access thereby afforded to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works authorized by the Thames embankment acts, a solid embankment was carried along the foreshore of the Thames, thus permanently stopping up and destroying Whitefriars' Dock. By reason thereof access along the dock from the plaintiff's premises to and from the Thames was prevented, and his premises were permanently damaged and diminished in value. The plaintiff recovered judgment in the Court of Common Pleas, which held that his premises were injuriously affected, and this decision was affirmed by the Exchequer Chamber and House of Lords. Many elaborate opinions were delivered in which the grounds of the decision were fully considered and all prior decisions touching the questions in issue were reviewed. We shall refer to the principles of this case further on. The McCarthy case was fully approved by the House of Lords in *Caledonia Ry. Co. v. Walker's Trustees*,<sup>24</sup> which involved a similar state of facts. There are many other English cases which go upon the same ground.<sup>25</sup>

<sup>24</sup> 7 Appeal Cas. 259.

<sup>25</sup> *Chamberlain v. The West End of London etc. Ry. Co.*, 2 Best & Smith, 605, 110 E. C. L. R. 604, 31 L. J. Q. 13, 201; *affd.* same, 617; *Glover v. North Staffordshire Ry. Co.*, 20 L. J. n. s. Q. B. 376; *Wood v. Stourbridge Ry. Co.*, 16 Q. B. n. s. 222; 111 E. C. L. R. 221; *Cameron v. Charing Cross Ry.* 16 C. B. n. s. 430; 111 E. C. L. R. 430; 33 L. J. C. P. 313; *Senior v. Metropolitan Ry. Co.*, 2 H. & C. (Ech.) 258; *Wadham v. Northeastern Ry.*

*Co.*, 14 L. R. Q. B. 747; *Ford v. Metropolitan R. R. Co.*, L. R. 17 Q. B. D. 12. But, where the obstruction is temporary only, being occasioned by the construction of the works, the premises are not injuriously affected within the meaning of the Lands Clauses Act, and compensation must be sought under a different provision. *Rickett v. Metropol. Ry. Co.*, 5 Best & Smith, 149, 117 E. C. L. R. 149; *affd.* L. R. 2 House of Lords, 175. See the case of the Caledonian Railway Co. v.

In *Rigney v. Chicago*,<sup>26</sup> it appeared that Rigney owned an improved lot on Kinzie street, which street was intersected at right angles by Halsted street, at a point 220 feet west of Rigney's property. The city built a viaduct on Halsted street over Kinzie street, so as entirely to prevent access to Halsted street from Kinzie except by stairs. The evidence showed that Halsted street was an important thoroughfare, upon which horse car lines were operated, affording communication with all parts of the city. No change whatever was made in Kinzie street in front of Rigney's property or elsewhere, but, as a result of the construction of the viaduct, and cutting off access to Halsted street along Kinzie street, Rigney's property was depreciated one-fourth or more. The Supreme Court of Illinois held that Rigney's property was damaged within the meaning of the constitution.<sup>27</sup> These cases settle the doctrine that an obstruction or interference with a public street or way need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as produces a diminution in the value of the property, as distinguished from mere personal inconvenience to the owner.<sup>28</sup>

The conclusions thus stated in the first edition have been verified by numerous decisions since rendered, and, we believe, without any material dissent, except in the case of Missouri, as shown below. If a street or public way communicating with the plaintiff's premises is obstructed elsewhere than in front of the plaintiff's property, as by a viaduct or bridge, or approach thereto, or by a railroad crossing a street in a cut or on an embankment, or otherwise, and the result of such obstruction is to render such property less valuable either to sell or to use, then the

Ogilvy, 2 Macq. Sc. App. 229;  
*Regina v. Met. Board of Works*,  
4 L. R. Q. B. 358.

<sup>26</sup> *Rigney v. Chicago*, 102 Ill.  
64.

<sup>27</sup> A somewhat similar case is  
found in *East St. Louis v. Lock-*

*head*, 7 Ill. App. 83; also *East  
St. Louis v. O'Flynn*, 19 Ill. App.  
64.

<sup>28</sup> *Caledonian Ry. Co. v. Wal-  
ker's Trustees*, 7 Appeal Cas.  
259.

property is damaged, and compensation may be recovered to the extent of the depreciation.<sup>29</sup>

A recent case in Missouri is apparently in conflict with these views. The plaintiff's premises were situated upon High street, which was crossed by a railroad two blocks or

<sup>29</sup> *Harvey v Georgia South-ern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. Rep. 783; *Burky v. Town of Lake*, 30 Ill. App. 23; *Republican Valley R. R. Co. v. Felions*, 16 Neb. 169; *Atchison etc. R. R. Co. v. Boener*, 34 Neb. 240, 51 N. W. Rep. 842; S. C. affirmed, 45, Neb. 453, 63 N. W. Rep. 787; *O'Brien v. Pennsylvania S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. Rep. 74; *Mellor v. City of Philadelphia*, 160 Pa. St. 614, 28 Atl. Rep. 991; *Harvey v. G. C. & S. F. R. R. Co.*, 3 Tex. Ct. of App. 336, §§ 278-280; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64. Compare *Lawrence v. City of Philadelphia*, 154 Pa. St. 20, 25 Atl. Rep. 1079; *Santry v. Pennsylvania S. V. R. R. Co.*, 4 Mont. Co. L. R. 144; *Enochs v. Philadelphia*, 2 Pa. Dist. Ct. 83; *Gilbert v. Greeley etc. R. R. Co.*, 13 Col. 501, 22 Pac. Rep. 814; *Union Pac. R. R. Co. v. Foley*, 19 Col. 280, 35 Pac. Rep. 542; *Union Pac. R. R. Co. v. Benson*, 19 Col. 285, 35 Pac. Rep. 544. In *Mellor v. City of Philadelphia*, 160 Pa. St. 614, 28 Atl. Rep. 991, the plaintiff's property was on the north side of Trenton avenue. The property on the south side of Trenton avenue was occupied by railroad tracks, running parallel to the avenue. To avoid grade cross-

ings the side streets adjacent to the plaintiff were lowered so as to go under the tracks and, as we understand it, under Trenton avenue also. Access from Trenton avenue to the side streets, except for pedestrians, was rendered impossible. Trenton avenue upon which the plaintiff's property abutted remained unchanged, but access to the nearest side streets was cut off. In holding that the plaintiff's property was injured, within the meaning of the constitution, the court said: "Defendant's contention was that this provision is inapplicable to any of the cases under consideration, because neither of the properties front or abut on either of the streets the grade of which was changed. This would, indeed, be a very narrow and unreasonable construction of the words above quoted, especially in view of the history and object of the constitutional provision. It was intended to provide against the great injustice that was continually resulting from the ruling of this court in *O'Connor v. Pittsburgh*, 18 Pa. St. 189, that 'the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed.' In connection with this statement of the controlling principle in that case, Mr. Chief

more away. The crossing was of such a character as completely to obstruct the street at that point. Two streets intersected High street, at right angles, between the plaintiff's premises and the crossing. The jury found that the plaintiff's premises were damaged or depreciated to the amount of two thousand dollars, and he recovered judgment for that sum. The Supreme Court reversed the case, holding that the plaintiff's damages were the same in kind as those suffered by the public generally, and that for such damages no recovery could be had, even under the word

Justice Gibson suggested that the omission might be supplied by ordinary legislation, but no such legislative action was ever taken. It was not until the adoption of our present constitution, nearly a quarter of a century thereafter, that an appropriate remedy was provided in the form of the section above quoted. In doing this, the people of the commonwealth recognized, in a practical way, the justice of compensating private property owners, not only for property taken, but also for property injured or destroyed by municipal and other corporations and individuals of the specified class, by the construction and enlargement of their works, highways, or improvements. There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway, or improvement by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it

words which are not in it, and were never intended to be there. It was contended on behalf of the city that, inasmuch as the properties of the several plaintiffs do not front on Orthodox street, they 'are not entitled to any damages; that, because Trenton avenue has not been changed, the plaintiffs, no matter how much they may have been injured, are not entitled to damages for the alteration of the side street;' and points for charge substantially to that effect were submitted. The learned trial judge very properly refused to thus narrowly and unreasonably construe the constitution. He rightly conceded, however, 'that where the street which undergoes an alteration is not sufficiently near to the property of a citizen as to make the injury proximate and immediate and substantial, he would have no right to claim damages for change of grade of such a street;' and, in connection therewith, he appropriately added: 'In case of properties situated as these properties are, and so affected by the change of grade that their ingress and egress to



damaged in the new constitution.<sup>30</sup> This case was approved and followed in two similar cases, decided a year or so later.<sup>31</sup> In these cases the street on which the plaintiffs abutted was obstructed by a railroad crossing below grade and the street was closed at that point. In one case the plaintiff's property was 350 feet from the obstruction, and in the other 125 feet. If the plaintiff's premises were depreciated in value by reason of the obstruction complained of, then, it seems to us, both the premise and conclusion of the court are wrong. When property is so situated with respect to a public way that its permanent obstruction depreciates its market value, then the owner of the property suffers a special and peculiar damage by reason of such obstruction, different from that of the public generally.<sup>32</sup> It is tacitly conceded by the Missouri court, and is unquestionably the law, that, if the plaintiff's damages were special and peculiar, then he had a right of action under the constitutional provision in question. The right to damages cannot be reduced to a question of distance, but depends upon

and from their houses is virtually injured,—partly destroyed,—and where the injury is so obvious that it admits of comparatively easy calculation as to the extent of the diminution of the value of the property, I cannot doubt that such a case is covered by the constitution.'"

<sup>30</sup> *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. Rep. 257.

<sup>31</sup> *Fairchild v. City of St. Louis*, 97 Mo. 85, 11 S. W. Rep. 60; *Canman v. City of St. Louis*, 97 Mo. 92, 11 S. W. Rep. 60. To same effect *Gates v. Kansas City etc. R. R. Co.*, 111 Mo. 28, 19 S. W. Rep. 957.

<sup>32</sup> Where property is so situated with respect to any kind of a public nuisance that it is permanently depreciated in value if the nuisance is regarded

as permanent, or the value of its use is lessened if it is regarded as temporary, then the owner of the property suffers a special and peculiar damage, different from that of the public generally, for which a private action will lie. *Stetson v. Faxon*, 19 Pick. 147; *Francis v. Schoellkopf*, 53 N. Y. 152; *Givens v. Van Studdiford*, 4 Mo. App. 498; *Wesson v. Washburn Iron Co.*, 13 Allen 95; *Blane v. Khimpke*, 29 Cal. 156; *Frink v. Lawrence*, 20 Conn. 117; *Brown v. Watrous*, 47 Me. 161; *Ottawa Gas Light Co. v. Graham*, 28 Ill. 73; *Illinois Central R. R. Co. v. Grabill*, 50 Ill. 242; *Attorney General v. Londsedale*, 7 L. R. Eq. Cas. 390. See also opinions in the *McCarthy* case, ante.

the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement. The Supreme Court of Missouri seems to have come to the same conclusion as to what is a special or peculiar damage in a subsequent case and to thus have cut away the ground upon which the decisions above referred to were based. A switch track was laid across the street on which plaintiff abutted, connecting with a brewery. The court found that the track was laid for a private use, that the permission to use the street was therefore void and the track a public nuisance. The plaintiff's property was 75 feet from the crossing but the evidence showed that its value would be depreciated by the obstruction. This was held to be such a special injury as entitled the plaintiff to an injunction. No reference is made to the cases above cited.<sup>33</sup>

The contention that such an interpretation of the constitution will give rise to an indefinite number of claims, is one which has been often made, but is without merit. The constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. This point was fully considered in the *Mc-*

<sup>33</sup> *Glaessner v. Anheuser-Busch Brewing Ass.*, 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420. The court says: "The city having no rightful authority to enact the ordinance, the switch tracks constructed thereunder on the public highway would be a public nuisance; and, in order for the plaintiff to maintain this injunction, he must show some special injury over and above the general injury to the general public. Some of the evidence offered by the defendant is that the construction of the switch will not decrease the

value of the plaintiff's property. On the other hand, it is alleged and shown that plaintiff's property is within seventy-five feet of the proposed crossing, and the weight of the evidence is that these proposed crossings will have the effect to divert travel to streets west of the brewery, and thereby decrease the value of the plaintiff's property, and take away some of the trade which he at this time enjoys. The evidence satisfied the trial court, and it satisfies us, that plaintiff will suffer an injury which entitles him to maintain this suit."

Carthy case, and in reference to it Justice Bramwell says: "If it is to be asked where the line is to be drawn, I answer not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles away, if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were one thousand claims of £1,000 each. If they are well founded, £1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?"<sup>34</sup>

§ 228. Competing ferries, bridges, etc.—It has been held, by the Supreme Court of West Virginia, that where a statute prohibited another ferry within half a mile of one already established, the statute would include a toll-bridge as well as a ferry, and that the diminution in value of the ferry by reason of the establishment of a toll-bridge within the prohibited distance was a damage and not a taking

<sup>34</sup> *McCarthy v. Metropolitan Board of Works*, L. R. 8 C. P. 191, 210. In the House of Lords Lord Penzance gives expression to similar views as follows:

"It was asked, in argument, where are the claims to compensation to stop, if the rule is so applied? The answer, I think is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been

permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position

within the constitution.<sup>35</sup> So the English courts have held a similar injury to be an injurious affecting.<sup>36</sup> And where a railroad was built along a stream, so as to interfere with a ferry, it was held that the proprietor was entitled to compensation.<sup>37</sup>

§ 229. *Interference with water rights.*—In *Duke of Buccleuch v. Metropolitan Board of Works*,<sup>38</sup> the plaintiff's property consisted of a leasehold interest in a mansion house and grounds abutting on the Thames River. He not only had free access to the river, but the grounds were secluded and quiet by reason of the river frontage and thereby rendered more valuable to sell or occupy. The defendant constructed an embankment along the river frontage which was to serve as a public highway. The result of this was to cut off access to the river and to destroy the quiet and seclusion of the premises. It was held that the plaintiff was entitled to recover the full amount of the depreciation of his premises.<sup>39</sup> Where a railroad was constructed along the shore of the sea below high-water mark, thus interfering with one's access to the sea, his property was held to be injuriously affected.<sup>40</sup> So an interference with access to a dock on a stream by a bridge is within the constitutional provision as to damage.<sup>41</sup> Damage which results to a lower

relatively to the highway which they occupy." *Metropolitan Board of Works v. McCarthy*, L. R. 7 Eng. & L. App. 243, 214.

<sup>35</sup> *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396. According to the views of the author, such an interference with an exclusive right is a taking. See ante, §§ 137, 138.

<sup>36</sup> See *Hopkins v. The Great Western Railway Co.*, L. R. 2 Q. B. D. 224; *Queen v. Cambria Railway Co.*, L. R. 6 Q. B. 422.

<sup>37</sup> *Cooling v. Great Northern R. Co.*, 19 L. J. Q. B. 25.

<sup>38</sup> 5 L. R. Ex. 221; *affd.* 5 L. R.

Eng. & Irish App. 418.

<sup>39</sup> Compare *Regina v. Metropolitan Board of Works*, L. R. 4 Q. B. 358; 38 L. J. Q. B. 201.

<sup>40</sup> *Queen v. Rynd*, 16 I. C. L. R. 29; *Bell v. Hull etc. R. R. Co.*, 6 M. & W. 699; but see *Falls v. Belfast etc. R. R. Co.*, 12 I. C. L. R. 233.

<sup>41</sup> *Chicago etc. R. R. Co. v. Stein* 75 Ill. 41; *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 312. It has been held in Pennsylvania that an interference with the feeders of an artificial stream which had flowed for over a century was to be regarded as an injury rather than a taking un-

proprietor by changes in the flow of a stream in consequence of the removal of shoals is not actionable.<sup>42</sup> The right to recover for diverting the waters of a stream to the damage of a lower proprietor was referred to this provision of the constitution in *Reading v. Althouse*,<sup>43</sup> though we think such a diversion is clearly a taking, as shown in a previous chapter.<sup>44</sup> Under the English acts it is held that compensation in such cases must be had under the clause giving damages for land injuriously affected.<sup>45</sup>

We have considered at length in a former chapter the right to recover for damage to land by interfering with riparian rights appurtenant thereto, or by flooding it permanently or temporarily by works for public use, or by injuriously affecting it in any-way through the agency of water, and we should say that any such damage, which is not held to be a taking, would clearly be a damage or injury within the constitution. Causing surface water to flow upon land where it is not accustomed to flow, or obstructing its flow so as to cause a submergence or saturation, by grading and improving streets,<sup>46</sup> or the building of railroads,<sup>47</sup> or other works for public use,<sup>48</sup> have been held

der their present constitution. *City of Reading v. Althouse*, 93 Pa. St. 400. In *Payne v. English*, 79 Cal. 540, 21 Pac. Rep. 952, plaintiff had piers and slips abutting on an arm of the bay of San Francisco, two hundred feet wide, and known as Channel street. The defendants, the state harbor commissioners, proposed to erect a wharf in Channel street in front of plaintiff's property, thirty feet wide and thus cut off his access to the bay. On a bill to enjoin, the opinion was expressed that this would not be a taking or damaging of the plaintiff's property within the constitution, but the decision itself was based on a question of title.

<sup>42</sup> *Rhodes v. Alredale Drainage Comrs.*, L. R. 1 C. P. Div. 402; s. c. *Same*, p. 380.

<sup>43</sup> 93 Pa. St. 400; *Lycoming Gas & W. Co. v. Moyer*, 99 Pa. St. 615.

<sup>44</sup> Ante, § 62.

<sup>45</sup> *Bush v. Trowbridge Water Co.*, 44 L. J. Ch. 645; S. C. L. R. 10 Ch. App. 459.

<sup>46</sup> *Town of Avondale v. McFarland*, 101 Ala. 381, 13 So. Rep. 504; *Atlanta v. Wood*, 78 Ga. 276; *Atchison v. Atlanta*, 81 Ga. 625, 7 S. E. Rep. 692; *Carson v. City of Springfield*, 53 Mo. App. 289; *In re Chatham street*, 191 Pa. St. 604, 43 Atl. Rep. 365.

<sup>47</sup> Ante, §§ 66-67, 89.

<sup>48</sup> *Mayor etc. of Albany v. Sikes*, 94 Ga. 39, 20 S. E. Rep.

to be remediable under this provision. So of a bridge, dam or other works which interfere with the flow of a stream so as to flood the land above or wash away the land below.<sup>49</sup> Damage by the pollution of a stream with sewage or otherwise, if not held to be a taking, is clearly a damage or injury within the constitution.<sup>50</sup> But where a railroad constructed its road along the banks of a stream upon a sandy soil, it was held not liable for injury to a mill pond by sand washed into the stream from the railroad land and embankment.<sup>51</sup>

§ 230. Damages from the operation of a railroad or its appurtenances on the private property of the company. Noise, smoke, vibrations, etc. —The operation of a railroad, the switching of cars to and fro, the use of coal bins, stock yards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance.<sup>52</sup> But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances, constitutes a taking, we have already considered.<sup>53</sup> But whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent constitutions. Where

257; Ware v. Regents Canal Co.,  
3 De G. & J. 212.

<sup>49</sup> Tyler v. Tehama County,  
109 Cal. 618, 42 Pac. Rep. 240;  
Delaware County's Appeal, 119  
Pa. St. 159, 13 Atl. Rep. 62;  
Fredericks v. Pennsylvania  
Canal Co., 148 Pa. St. 317, 23  
Atl. Rep. 1067.

<sup>50</sup> Joplin Consol. Min. Co. v.  
City of Joplin, 124 Mo. 129, 27  
S. W. Rep. 406.

<sup>51</sup> Trinity etc. R. R. Co. v.  
Meadows, 73 Tex. 32, 11 S. W.  
Rep. 145.

<sup>52</sup> See post, §§ 496-498.

<sup>53</sup> Ante, § 151a.

the use and operation of a railroad or switch yards on the private property of the company adjacent to, or in the near vicinity of the plaintiff's property, or across the street from him, depreciates the value of his property by reason of the noise, smoke, vibration, etc., his property is damaged within the constitution and he is entitled to compensation.<sup>54</sup> So where the damage results from the use of coal bins, water tanks, round houses and the like, similarly situated with reference to the plaintiff's property.<sup>55</sup> Where a railroad was laid alongside a highway opposite the plaintiff's farm and impaired the value of the farm by rendering access thereto with teams and stock more dangerous, he was held entitled to recover compensation.<sup>56</sup>

A different view is taken of the constitution of Pennsylvania by the supreme court of that State. Railroad companies in that State are required to make compensation

<sup>54</sup> Chicago etc. R. R. Co. v. Leah, 152 Ill. 249, 38 N. E. Rep. 556; Chicago etc. R. R. Co. v. Drake, 148 Ill. 226, 35 N. E. Rep. 750, 9 Am. R. R. & Corp. Rep. 73; Chicago etc. R. R. Co. v. Coggsell, 44 Ill. App. 388; Wisconsin Cent. R. R. Co. v. Wleczorek, 51 Ill. App. 498; Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. Rep. 478, 3 Am. R. R. & Corp. Rep. 268; Omaha etc. R. R. Co. v. Moschel, 38 Neb. 281, 56 N. W. Rep. 875; Gulf etc. R. R. Co. v. Necco (Tex.) 15 S. W. Rep. 1102, S. C. 13 S. W. Rep. 564; Gainesville etc. R. R. Co. v. Hall, 78 Tex. 63, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 233, 17 S. W. Rep. 620; Stone v. Fairbury, Pontiac & North Western Ry. Co., 63 Ill. 394; City of Morrison v. Hinkson, 87 Ill. 587.

Compare Atchison etc. R. R. Co. v. Lenz, 35 Ill. App. 330; Hammersmith etc. R. R. Co. v. Brand, L. R. 4 Eng. & Ir. App. 171.

<sup>55</sup> Wiley v. Elwood, 134 Ill. 281, 25 N. E. Rep. 570; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. Rep. 620; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. Rep. 478, 3 Am. R. R. & Corp. Rep. 268; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326.

<sup>56</sup> Lake Erie & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. Rep. 78; S. C. 32 Ill. App. 292. It has been held in Illinois that lots adjacent to a railroad, no parts of which were taken, were damaged to the extent of "the depreciation in market value of the same by reason of the construction and maintenance of the road." Eberhart v. Chicago etc. R. R. Co., 70 Ill. 347.

for property taken, injured or destroyed by the construction or enlargement of their works, and this compensation is required to be paid in advance.<sup>57</sup> It is held that one, no part of whose property has been taken, cannot recover for the damages resulting from the lawful and proper operation of a railroad adjacent to or in the near vicinity of his property.<sup>58</sup> It is held that the word injured in the constitution embraces only such wrongs as would be actionable but for the statutory authority, and such as are occasioned by the construction and enlargement of works and improvements, as distinguished from their use or operation.<sup>59</sup>

A recovery may be had for damage caused by dust and dirt drifting upon one's premises from a bridge or embankment.<sup>60</sup> Damage arising from the fact that premises can be overlooked from a railroad embankment, or by persons traveling over the same in coaches, have been held not to be within the English act;<sup>61</sup> also damages caused by vibrations made by passing trains.<sup>62</sup>

§ 231. **Miscellaneous cases.**—Obstructing the access of

<sup>57</sup> See ante, § 44.

<sup>58</sup> *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690; *Dooner v. Pennsylvania R. R. Co.*, 142 Pa. St. 36, 21 Atl. Rep. 755; *Pennsylvania Company for Insurance v. Pennsylvania S. V. R. R. Co.*, 151 Pa. St. 334, 25 Atl. Rep. 107.

<sup>59</sup> See especially *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690. This case was affirmed in the Supreme Court of the United States, but the latter court only considered whether the constitution of Pennsylvania, as construed by the Supreme Court of that State, operated to deprive the plaintiff of his property without due process of law, or of the equal pro-

tection of the laws. *Marchant v. Pennsylvania R. R. Co.*, 153 U. S. 380, 14 S. C. Rep. 894.

<sup>60</sup> *Turner v. Sheffield & Rotherham R. R. Co.*, 10 M. & W. 425; *East and West India Docks and Birmingham Junction Ry. Co. v. Gattke*, 20 L. J. n. s. Ch. 217; *Stack v. City of East St. Louis*, 85 Ill. 377; *Chicago etc. R. R. Co. v. Coggs*, 44 Ill. App. 388; *Shano v. Bridge Co.*, 189 Pa. St. 245, 42 Atl. Rep. 128.

<sup>61</sup> *In re Penny*, 7 Ellis & B. 660; 90 E. C. L. R. 658; 26 L. J. Q. B. n. s. 225; *Shano v. Bridge Co.*, 189 Pa. St. 245, 42 Atl. Rep. 128.

<sup>62</sup> *Brand v. Hammersmith City Ry. Co.*, L. R. 1 Q. B. 130; S. C. (Exch. Cham.) L. R. 2 Q. B. 223; S. C. (House of Lords) L. R. 4 Eng. & Irish App. 171.



light to premises is a damage for which a recovery may be had.<sup>63</sup> Plaintiffs had a rifle range, and, for the purpose of maintaining it, had an interest in three fields in a straight line. On one field was the range. The plaintiffs had a verbal arrangement with the owner of the next field, revocable on notice, by which they paid him forty-nine pounds a year liquidated damages. The third field was leased to the plaintiffs. A road was constructed through the middle field, which rendered the range useless for the purpose for which plaintiffs held it. It was held that the interest of plaintiffs in the first and third fields was injuriously affected.<sup>64</sup> The construction of street railway tracks across the tracks of a commercial railroad, which intersect the street, is not a taking or damaging of the property of the commercial road.<sup>65</sup> Where a railroad purchased the rear end of plaintiff's lot and went under the surface in a tunnel, constructing a ventilating shaft therein, which was afterwards enlarged so as to increase the annoyance to plaintiff by smoke, gases, etc., it was held the plaintiff had no cause of action for such increased discomfort.<sup>66</sup> Where plaintiff's property was diminished in value by the construction of a jail or fire-engine house adjacent thereto, it was held that his property was not damaged within the meaning of the constitution.<sup>67</sup>

<sup>63</sup> *Eagle v. Charing Cross Ry. Co.*, 2 L. R. C. P. 638; *Turner v. Sheffield & Rotherham R. R. Co.*, 10 M. & W. 425; *London etc. R. R. Co. v. Trustees of Gower Walk School*, L. R. 24 Q. B. D. 40, 326. See also *Barrows v. City of Sycamore*, 150 Ill. 588, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62.

<sup>64</sup> *Holt v. The Gas Light & Coke Co.*, 7 L. R. Q. B. 728.

<sup>65</sup> *Chicago etc. R. R. Co. v. West Chicago St. R. R. Co.*, 156 Ill. 270, 40 N. E. Rep. 1008, 12 Am. R. R. & Corp. Rep. 522; *Pittsburgh etc. R. R. Co. v. West*

*Chicago St. R. R. Co.*, 54 Ill. App. 273; *Chicago etc. Terminal R. R. Co. v. Whiting etc. R. R. Co.*, 139 Ind. 297, 38 N. E. Rep. 604, 11 Am. R. R. & Corp. Rep. 507; *New York etc. R. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. Rep. 953; *Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co.*, 97 Mo. 457, 10 S. W. Rep. 826.

<sup>66</sup> *Attorney General v. Metropolitan R. R. Co.*, L. R. (1894) 1 Q. B. D. 384.

<sup>67</sup> *Bacon v. Walker*, 77 Ga. 336; *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. Rep. 695, 5

§ 232. The words in question were intended to enlarge the right to compensation.—Of this there can be no question. Any other construction would render the words nugatory. They are “an extension of the common provision for the protection of private property.”<sup>68</sup> “The words, injured or destroyed, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation.”<sup>69</sup> The supreme court of the United

Am. R. R. & Corp. Rep. 196. And see the following sections.

<sup>68</sup> *Transportation Co. v. Chicago*, 99 U. S. p. 642.

<sup>69</sup> *City Council of Montgomery v. Townsend*, 80 Ala. 489, 492. To the same effect are *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Reardon v. San Francisco*, 66 Cal. 492; *Denver v. Bayer*, 7 Col. 113; *Rigney v. Chicago*, 102 Ill. 64; *Gottschalk v. Chicago*, *Burlington & Quincy R. R. Co.*, 14 Neb. 550; *Omaha & Republican Valley R. R. Co. v. Struden*, 22 Neb. 343; *Johnson v. Parkersburg*, 16 W. Va. 402; *City Council of Montgomery v. Maddox*, 89 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426; *City of Buffalo v. Strait*, 20 Col. 13, 36 Pac. Rep. 790; *Campbell v. Metropolitan St. R. R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078; *City of Vicksburg v. Herman*, 72 Miss. 211, 16 So. Rep. 434; *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. Rep. 695, 5 Am. R. R. & Corp. Rep. 196; *Schaller v. City of Omaha*, 23 Neb. 325, 36 N. W. Rep. 533; *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295; *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577; *Gainsville etc. R. R. Co. v. Hall*, 78 Tex. 169, 14

S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64; *Searle v. Lead*, 10 S. D. 312. In *Galveston etc. R. R. Co. v. Fuller*, 63 Tex. 467, the Supreme Court of Texas says: “This language is broader than that used in the former constitutions of this State, and was doubtless intended to meet all cases in which, even in the proper prosecution of a public work or purpose, the right or property of any person, in a pecuniary way, may be injuriously affected by reason of the thing being made thereby less valuable, or its use by the owner restricted by the public use to which it is wholly or partially applied, without compensation having been first made to the owner. It is also not improbable that it was intended, by the language found in the present constitution, to meet and correct evils which had sometimes been thought to result to the property-owner from a narrow and technical meaning sometimes put by the courts upon the word ‘taken’ used in the former constitutions of this State and in the constitutions of the most of the

States, referring to the constitution of Illinois, says: "The use of the word 'damaged' in the clause providing for compensation to the owners of private property, appropriated to public use, could have been used with no other intention than that expressed by the State court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former constitution."<sup>70</sup>

§ 232a. The words in question should be liberally construed. —The provisions of the constitution requiring compensation to be made for property taken, injured or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold.<sup>71</sup> "The language of the constitution is to be con-

other States. The word 'property,' as used in the section of the constitution referred to, is doubtless used in its legal sense, and means not only the thing owned, but also every right which accompanies ownership and is its incident. Thus considered, under the rules established by the great weight of judicial decisions, and opinions of elementary writers eminent for their learning, the facts of this case amount to a taking of private property for a public use." p. 469. \* \* \* "The word 'damaged' is evidently used in the sense in which the word 'injured' is ordinarily understood. By damage is meant 'every loss or diminution of what is a man's own, occasioned by the fault of another,' whether this results directly to the thing

owned, or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto; that is, if an injury, not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public works exist, be inflicted, then such property may be said to be damaged." p. 470.

<sup>70</sup> Chicago v. Taylor, 125 U. S. 161, 8 S. C. Rep. 820.

<sup>71</sup> City of Pueblo v. Strait, 20 Col. 13, 36 Pac. Rep. 790; Schaller v. City of Omaha, 23 Neb.

strued liberally so as to carry out and not defeat the purpose for which it was adopted."<sup>72</sup>

§ 233. They include any physical injury to property not held to be a taking.—In the chapters on What Constitutes a Taking, we have endeavored to show that any physical injury to property is a taking, but all the decisions do not bear out this conclusion.<sup>73</sup> In States which hold that there is any kind of physical injury which is not a taking, the words in question would clearly cover such physical injury. Thus any invasion of one's premises by water or gases, or by casting upon them smoke or cinders, or affecting them by vibrations, if not held to be a taking, would certainly be a damage or injury within the constitutional provisions now under consideration.<sup>74</sup>

§ 234. Also any interference with private rights not held to be a taking.—We have also endeavored to show that any interference with any private right appurtenant to property, such as the right of support, the right to pure air, etc., was a taking for which compensation must be made under our constitutions as they existed prior to 1870.<sup>75</sup> Many courts, however, have held otherwise. We think it clear that, where such interference is held not to be a taking, it must be held to be a damage or injury. So far, we think, no question can arise as to the interpretation of the words under consideration.

§ 235. And, generally, any damage to property arising from an interference with a right, public or private, which

325, 36 N. W. Rep. 533; *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295. In *Boyd v. United States*, 116 U. S. 616, 635, it is said that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is

the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

<sup>72</sup> *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577.

<sup>73</sup> See ante, §§ 56-59; chapters iii., iv., v., vi.

<sup>74</sup> See ante, §§ 229 et seq.

<sup>75</sup> Ante, §§ 151-152b.

does not amount to a taking. —After forty years of litigation in England over the proper construction of the words injuriously affected, we think it may now be regarded as settled, that they include any damage to property produced by an interference with a right, either public or private, which the owner or occupier is entitled to make use of in connection with the property, and the loss or impairment of which renders the property less valuable.<sup>76</sup> In *McCarthy's Case* the Lord Chancellor says: "My Lords, in his very able argument at your Lordships' bar, Mr. Thesinger stated what he would rely upon as a definition of the right to compensation, and, having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. Thesinger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value."<sup>77</sup> Substantially the same test is adopted by the Supreme Court of Illinois in interpreting the word "damaged" in the constitution of that State. "In all cases," says the court, "to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sus-

<sup>76</sup> The doctrine is settled and the cases reviewed in *McCarthy v. Metropolitan Board of Works*, L. R. 7 Eng. & Irish App. 243, and *Caledonian Railway v. Wal-*

*ker's Trustees*, L. R. 7 App. Cas. 259.

<sup>77</sup> *Metropolitan Board of Works v. McCarthy*, 7 E. & I. App. Cas. 243, 253.

tained by the public generally.”<sup>78</sup> In a more recent case the same court has held the disturbance of the right need not necessarily be a “direct physical disturbance” in order to bring the case within the constitution. A railroad was constructed alongside a highway and the farm opposite was diminished in value because access thereto over the highway was rendered dangerous and inconvenient by the operation of the road. It was held that the farm was damaged within the meaning of the constitution.<sup>79</sup>

<sup>78</sup> *Rigney v. Chicago*, 102 Ill. 64, 81. This language is quoted and approved as a proper interpretation of the Illinois constitution by the Supreme Court of the United States in the recent case of *Chicago v. Taylor*, 125 U. S. 161. And see *Chicago etc. R. R. Co. v. Cogswell*, 44 Ill. App. 88.

<sup>79</sup> *Lake Erie & W. R. R. Co. v. Scott*, 132 Ill. 429, 24 N. E. Rep. 78. After referring to the *Rigney* case, above cited, the court says: “We are inclined to think that there is no good reason for distinguishing between an injury arising from an interference with appellee’s right to the advantages the highway gave his farm, caused by a physical obstruction placed therein, as in the foregoing case, and where the same kind of an injury is produced by the operation of trains beside it. In either case the advantages given the farm by the highway have to some extent been destroyed, and the land lessened in value. If it be conceded that the result of operating the road has in fact injured appellee’s farm in a way not common to the public, and thereby made it less valuable, it

would seem to follow as a necessary consequence that it has been damaged for public use. Such operation, being lawful, and confined to the right of way, does not release appellant from liability; for it would clearly be liable for damages caused by an unlawful act, and, as we understand the constitutional provision that private property shall not be taken nor damaged for public use without just compensation, it means to cover cases where damages are caused by acts that are legal, and entirely within the power of the corporation performing them, but in the doing of which, for the use and benefit of the public, private property is damaged. It follows, therefore, that appellant’s proposition that ‘a corporation is not liable unless an individual doing the same thing on his private property would be,’ as applied to this case is not sound. An individual cannot legally take or damage private property for public use, but a railroad company can lawfully do either, if in so doing it makes compensation.” This is from the opinion of the appellate court, adopted and approved by the Supreme Court.

In speaking of the word damaged in the constitution of Nebraska, the supreme court of that State says: "It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large."<sup>80</sup> Similar conclusions have been reached in other States.<sup>81</sup> The test here proposed is one which can be readily applied in all cases, which gives ample scope to the words in question, and which affords full protection to the owners of private property, without casting any unnecessary burden upon those engaged in works of a public nature.

The leaving of abutting property in a condition, or the use of it in a way, to endanger travel on the adjacent street, is undoubtedly a public nuisance. Elliott, *Roads and Streets*, p. 542 et seq. The operation of a railroad on private property adjacent to a street or highway, without authority of law, in such a manner as to frighten horses and endanger travel, would, therefore, be to maintain a public nuisance. If the use of the property on the opposite side of the street was thereby interfered with so as to diminish its rental or saleable value, the owner would suffer a special damage, and would be entitled to maintain a private action. Consequently, it would follow that when the same damage results from a railroad authorized by law, the owner would have a remedy under the constitution, and the case is no exception to the general rule.

<sup>80</sup> *Gottschalk v. Chicago*, Burlington & Quincy R. R. Co., 14 Neb. 550, 560; *Omaha Belt R. R.*

*Co. v. McDermott*, 25 Neb. 717, 41 N. W. Rep. 648. But compare *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295; *Chicago etc. R. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. Rep. 93; *Schaller v. City of Omaha*, 23 Neb. 325, 36 N. W. Rep. 533. See next section.

<sup>81</sup> *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *City of Pueblo v. Strait*, 20 Col. 13, 36 Pac. Rep. 790; *Peel v. Atlanta*, 85 Ga. 133, 11 S. E. Rep. 532, 2 Am. R. R. & Corp. Rep. 413; *Campbell v. Metropolitan St. R. R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078; *City of Vicksburg v. Herman*, 73 Miss. 211, 16 So. Rep. 434; *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. Rep. 695, 5 Am. R. R. & Corp. Rep. 196; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690; *Pennsylvania S. V. R. R. Co. v. Walsh*, 124 Pa. St. 544, 17 Atl. Rep. 186; *Trinity & S. R. R. Co. v. Meadows*, 73 Tex. 32, 11 S. W. Rep. 145; *Gainsville etc. R. R. Co. v.*

§ 235a. When claim based on an interference with a public right, the plaintiff's damages must be special and peculiar. —According to the rule laid down in the last section the owner of property may recover, as for a damage or injury, under the constitution, though the only actual injury or wrongful act complained of consists of an obstruction or interference with a right which he enjoys in common with the public. In such case, it is the universal rule that the plaintiff must show an injury or damage which is special and peculiar to himself; as distinguished from that suffered by the public at large.<sup>82</sup>

§ 235b. Different views regarding the proper construction of the words "damaged" or "injured."—In endeavoring to give a general interpretation to the words damaged or injured, as used in recent constitutions, courts have usually adopted one or the other of the following views: 1. That the words embrace only what are known as actionable damages, that is, such damages as would form the basis of an action at common law, but for the statutory authority.<sup>83</sup>

Hall, 78 Tex. 169, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. Rep. 620; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64.

<sup>82</sup> Town of Longmont v. Parker, 14 Col. 386, 23 Pac. Rep. 443, 2 Am. R. R. & Corp. Rep. 91; Fairchild v. City of St. Louis, 97 Mo. 85, 11 S. W. Rep. 60; Carman v. City of St. Louis, 97 Mo. 92, 11 S. W. Rep. 60; Glaessner v. Anheuser-Busch Brewing Ass., 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420; Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. Rep. 695, 5 Am. R. R. & Corp. Rep. 196; Gates v. Kansas City etc. R. R. Co., 111 Mo. 28, 19 S. W. Rep. 957; Penn-

sylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690; Pennsylvania S. V. R. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. Rep. 186; Trinity etc. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. Rep. 145; Brown v. Bd. of Sup., 124 Cal. 274, 57 Pac. Rep. 82.

<sup>83</sup> Town of Longmont v. Parker, 14 Col. 386, 23 Pac. Rep. 443, 2 Am. R. R. & Corp. Rep. 91; Peel v. Atlanta, 85 Ga. 138, 11 S. E. Rep. 582, 2 Am. R. R. & Corp. Rep. 413; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690; Pennsylvania S. V. R. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. Rep. 186; Trinity & S. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. Rep. 145; Gainesville etc. R. R.



2. That they embrace only damages caused by some physical injury to the property, or by an interference with some private right appurtenant to the property, or of some public right, which the owner is entitled to make use of in connection with the property.<sup>84</sup> 3. That they cover any loss

Co. v. Hall, 78 Tex. 163, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; Haney v. G. C. & S. F. R. R. Co., 3 Tex. Ct. of App. p. 336, §§ 278-280. And see Henderson Belt R. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. Rep. 605; McMahon v. St. Louis etc. R. R. Co., 41 La. An. 827, 6 So. Rep. 640. In the case of Peel v. Atlanta, 85 Ga. 138, 11 S. E. Rep. 582, 2 Am. R. R. & Corp. Rep. 413, it is said: "The effect of such provisions is not to authorize compensation in all cases where property may be injured by public works, but only where the enjoyment of some right of the plaintiff in reference to his property is interfered with, and the property thereby rendered less valuable. The test is, would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of action against such person? If so, then he is entitled to compensation notwithstanding the statute which legalizes the damaging work. The constitutional or statutory provision simply prevents the defendant from shielding himself under legislative authority against liability for damages consequent upon the work. Hence, if no part of the plaintiff's land is taken, and no other right of his is disturbed, he cannot have compensation." And in Trinity etc. R. R. Co. v.

Meadows, 73 Tex. 32, 11 S. W. Rep. 145, the court says: "We do not understand that it was intended to give an action against those constructing public works, for acts which if done by persons in pursuit of a private enterprise would not have been actionable. \* \* \* If a corporation do an act which it acquires a right to do by virtue of its franchise granted for public use, and if a person having no franchise could not have done the act lawfully, and the property of another is directly damaged, then we understand that the constitutional provision requires that notwithstanding the franchise the corporation shall be liable."

<sup>84</sup> Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. Rep. 595, 5 Am. R. R. & Corp. Rep. 196. "Whether the plaintiff must now, in all cases, where claiming that his property has been 'damaged' for public use, show that the injury is one for which he might have maintained an action if the act had not been done by authority of law, we need not say in this case. What we do say is this: that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected." See also cases cited in last section and Gates v. Kansas City

or injury which may properly be taken into consideration, in estimating damages to the balance of a tract when part is taken.<sup>85</sup> 4. That they embrace any depreciation caused by the construction and operation of works for public use, no matter how occasioned.<sup>86</sup> The third and fourth of these

etc. R. R. Co., 111 Mo. 28, 19 S. W. Rep. 957.

<sup>85</sup> Brewer, J., in *Omaha Horse R. R. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727, in speaking of the construction of the word "damaged," says: "It is futile to attempt a general answer, or to lay down a rule to determine all cases. One proposition may be affirmed. Whenever a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would be a proper element of damages to the part not taken, there is a damage within the scope and protection of this constitutional provision, entitling the owner to compensation." As to what damages may thus be taken into consideration see post, § 503a.

<sup>86</sup> In *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295, the court says that "the words, 'or damaged,' in section 21, art. 1, of the constitution, include all actual damages, resulting from the exercise of the right of eminent domain, which diminish the market value of private property." \* \* \* "The fact that damages are consequential will not preclude a recovery if the construction and operation of the public improvement is the cause of the injury,

and it is not necessary that the damages be caused by trespass, or an actual physical invasion of the owner's real estate. The test is, excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation. It is not within the scope of the authority of the law-making department of the government to take the property of A. and give it to B., even if B. has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B. to damage or destroy the property of A. without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If the property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case, all the property is taken, while in the other it is taken only to the extent that it is diminished in value; and in either case the owner is entitled to be compensated for his loss." The case of *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541,

rules of construction doubtless amount to the same thing, that property is damaged whenever it is depreciated in value by the construction or operation of works for public use. The first rule is doubtless too restricted, since in some cases and in some jurisdictions, it would exclude compensation for injuries, which were intended to be indemnified.<sup>87</sup> the matter is further considered in the following section.

**§ 236. Damages not embraced by the words in question.**—It is evident that the rule of interpretation laid down in section 235 will not embrace every species of loss or depreciation to property which is due directly to public improvements. Unless property is physically affected or the owner is disturbed in the enjoyment of some right which he is entitled to make use of in connection with his property, he cannot recover. If the loss or depreciation arises from the mere proximity of the work or improvement, as from its unsightly nature or its incongruity with the uses to which the neighboring property is put, there can be no recovery. There are no decided cases to which we can refer on this point, but we can easily illustrate our meaning. Suppose the public authorities purchase or condemn a lot in a fashionable residence locality and erect and maintain a jail thereon, and suppose the direct effect is to depreciate the surrounding property twenty-five to fifty per cent. Is the property so depreciated damaged, injured, or injuriously affected within the meaning of the provisions in question? We answer in the negative, because the owners have not been disturbed, either in the enjoyment of their estates, or of any right connected with their estates. Their property and rights remain as before. The same effect might be

13 Atl. Rep. 690, is referred to and disapproved. The Kramer case is approved in Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93. But in neither of these cases was it decided that a mere diminution in value would sustain a recovery. In the Kramer case the street in front of

plaintiff was occupied by a viaduct. In the Hazels case the street on which plaintiff abutted was obstructed and closed a block west of his property. Compare Woodbury v. Beverly, 153 Mass. 245, 26 N. E. Rep. 851.

<sup>87</sup> See Woodbury v. Beverly, 153 Mass. 245, 26 N. E. Rep. 851.

produced if an individual should establish on the same lot a boarding-house, a school or a factory. It seems to us the true rule is that, unless the depreciation is due to the disturbance of some right, no recovery can be had. In any other case the loss is the same as is often sustained by one proprietor by the lawful use of adjacent or neighboring property, and is *damnum absque injuria*.

The foregoing remains as written in the first edition, but the conclusions stated have been verified by recent decisions. In speaking generally of the constitutional provisions in question, the supreme court of California says: "The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."<sup>88</sup>

Although the opinion has been expressed in some cases that there could be a recovery for mere depreciation caused by a public improvement or the use of public works,<sup>89</sup> yet

<sup>88</sup> *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750.

<sup>89</sup> See cases cited in last section, note 86.

a recovery has not been allowed in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement, afforded no ground for redress. Thus it has been held that the erection of a fire-engine house<sup>90</sup> or jail<sup>91</sup> on a lot adjoining plaintiff's afforded no cause of action, though his property was depreciated thereby. The principle of these decisions would cover the case of a school-house, court-house, market or other public building, erected upon adjacent property. In almost every city there are localities in which the erection and use of such a building would depreciate the surrounding property. In such case there is no invasion or physical injury of the property affected, nor an interference with any right, public or private, connected therewith. The only ground of complaint is, that one owner, by a perfectly legitimate use of his property, has depreciated the value of the adjoining property. The same result might have happened by the establishment of a store or factory. Every owner takes the chance of having the value of his property enhanced or diminished by the use made of surrounding property, and the character of the improvements put upon it. He has no cause of complaint on account of the nature of such uses or improvements, unless they amount in law to a nuisance.<sup>92</sup> The grievances which lead to the insertion of the words "damaged" or "injured" in recent constitutions, did not consist in the fact that such damages as have just been referred to went without redress, but in the fact that,

<sup>90</sup> *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. Rep. 695, 5 Am. R. R. & Corp. Rep. 196.

<sup>91</sup> *Bacon v. Walker*, 77 Ga. 336.

<sup>92</sup> In *Peel v. Atlanta*, 85 Ga. 138, 11 S. E. Rep. 582, 2 Am. R. R. & Corp. Rep. 413, the city

bought a lot next to plaintiff and laid it out as a street. It was held the plaintiff's property was not damaged. And see *Trinity etc. R. R. Co. v. Meadows*, 73 Tex. 22, 11 S. W. Rep. 145.

under the restricted interpretation put upon the word "taken," private property might be subjected to physical injuries, and valuable rights appurtenant thereto or connected therewith, might be impaired or destroyed for public use without compensation.<sup>93</sup> These words were not inserted for the purpose of preventing the public from doing what every private individual may do without liability to his neighbor. They were not intended to confer a right of action for a use of property by the public, which a private individual might make without legislative authority.<sup>94</sup>

<sup>93</sup> City Council of Montgomery v. Maddox, 89 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426; City of Vicksburg v. Herman, 72 Miss. 211, 16 So. Rep. 434; Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. Rep. 695, 5 Am. R. R. & Corp. Rep. 196; Trinity & S. R. R. Co. v. Meadows, 73 Tex. 32, 11 S. W. Rep. 145; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64.

<sup>94</sup> The leading cases in the United States on the construction of the words in question are, Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; City Council of Montgomery v. Townsend, 30 Ala. 489; Reardon v. San Francisco, 66 Cal. 492; Denver v. Bayer, 7 Col. 113; Atlanta v. Green, 67 Ga. 386; Rigney v. Chicago, 102 Ill. 64; Chicago & Western Indiana R. R. Co. v. Ayres, 106 Ill. 511; Gottschalk v. Chicago, Burlington & Quincy R. R. Co., 14 Neb. 550; Galveston etc. R. R. Co. v. Fuller, 63 Tex. 467; Johnson v. Parkersburg, 16 W. Va. 402; Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37

Pac. Rep. 750; City of Pueblo v. Strait, 20 Col. 13, 36 Pac. Rep. 790; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078; Lake Erie & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. Rep. 78; Wiley v. Elwood, 134 Ill. 281, 25 N. E. Rep. 570; Chicago etc. R. R. Co. v. Drake, 148 Ill. 226, 35 N. E. Rep. 750, 9 Am. R. R. & Corp. Rep. 73; Omaha etc. R. R. Co. v. Janeczek, 30 Neb. 276, 46 N. W. Rep. 478, 3 Am. R. R. & Corp. Rep. 268; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690; Mellor v. City of Philadelphia, 160 Pa. St. 614, 28 Atl. Rep. 991; Gainesville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251.

The leading cases in England are McCarthy v. Metropolitan Board of Works, 7 Eng. & I. App. 243; Caledonian Railway v. Walker's Trustees, 7 App. Cas. 259. Damages by reason of negligence in the construction of works are, of course, not included. Edmundson v. Pittsburgh etc. R. R. Co., 111 Pa. St. 316.

## CHAPTER IX.

### THE STATUTORY AUTHORITY.

§ 237. **Power of the legislature generally.**—The power of eminent domain, being an incident of sovereignty, is inherent in the federal government and in the several States, by virtue of their sovereignty.<sup>1</sup> It does not exist in any subordinate political division or public corporation unless granted by the sovereign power. Consequently it does not exist in any territorial government unless it has been expressly granted by congress.<sup>2</sup> This power, with all its incidents, is vested in the legislatures of the several States by the general grant of legislative powers contained in the constitution. From this it follows, first, that the power can only be exercised by virtue of a legislative enactment;<sup>3</sup>

<sup>1</sup> Ante, §§ 1-3; *Kohl v. United States*, 91 U. S. 367; *Darlington v. United States*, 82 Pa. St. 382; *Baltimore & Ohio, R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 812, 841; *Fulton v. Town of Dover*, 8 Houston, (Del.) 78; S. C. 6 Del. Ch. 1; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. Rep. 1062; *Spring City Gas Light Co. v. Pennsylvania S. V. R. R. Co.*, 167 Pa. St. 6, 31 Atl. Rep. 368; *Winona etc. R. R. Co. v. Watertown*, 4 S. D. 323, 56 N. W. Rep. 1077; *United States v. Fox*, 94 U. S. 315, 320; *Jones v. Walker*, 2 Paine C. C. 688.

<sup>2</sup> *Newcomb v. Smith*, 1 Chand. Wis. 71; *Pratt v. Brown*, 3 Wis. 603.

<sup>3</sup> *Leeds v. Richmond*, 102 Ind. 372; *Bethum v. Turner*, 1 Me. 111; *Parham v. Decatur County*, 9 Ga. 341; *Sholl v. German Coal Co.*, 118 Ill. 427; *Schmidt v. Dens-*

*more*, 42 Mo. 225; *Tyson v. Rogers*, 33 Ga. 473; *Matter of Niagara Falls & W. R. R. Co.*, 108 N. Y. 375, 15 N. E. Rep. 429; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. Rep. 601; *Matter of Union Elevated R. R. Co.*, 113 N. Y. 275, 21 N. E. Rep. 81; *City of Tacoma v. State*, 4 Wash. 64, 29 Pac. Rep. 847; *Long v. Billings*, 7 Wash. 267, 34 Pac. Rep. 936; *St. Louis etc. R. R. Co., v. Thomas*, 34 Fed. Rep. 774; *United States v. Rauers*, 70 Fed. Rep. 748; *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205; *Wallace v. Richmond*, 94 Va. 204; *In re Pet. of Alston*, 1 Penn. Del. 359.

In matter of *Poughkeepsie Bridge Co.*, 108 N. Y. 483, 490, it is said: "The power of eminent domain which resides in the State as an attribute of sovereignty, is nevertheless dormant

second, that the time, manner and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the constitution.<sup>4</sup> "It lies in its discretion to determine to what extent, on what occasions, and under what circumstances this power shall be exercised."<sup>5</sup> The constitution of Missouri permits cities of over one hundred thousand population to frame their own charters. Provisions for the exercise of the eminent domain power contained in such charters are valid, the power emanating directly from the people, instead of through the legislature.<sup>6</sup>

§ 238. The necessity or expediency of exercising the power is exclusively for the legislature.—Whether the power of

until called into exercise by an act of the legislature. Until a statute authorizes an exercise of the power, it is latent and potential merely, and not active or efficient, and the State can neither exercise the prerogative, nor can it delegate its exercise, except through the medium of legislation. Therefore it is that whenever an attempt is made either by the officers of the State or by a corporation organized for a public purpose to take private property under the power of eminent domain, the officers or body claiming the right must be able to point to a statute conferring it. In the absence of statutory authority private property cannot be invaded by this power, however strong may be the reasons for the appropriation."

<sup>4</sup> Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. Rep. 1062; Van Wilson v. Gutman, 79 Md. 405, 29 Atl. Rep. 608; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. Rep. 325; State v. Engleman, 106 Mo. 628, 17 S. W. Rep. 759; Simpson v.

Kansas City, 111 Mo. 237, 20 S. W. Rep. 38; Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. Rep. 1077; Secombe v. Railroad Co., 23 Wall. 108; St. Louis R. R. Co. v. Thomas, 34 Fed. Rep. 714; Bachler's App. 90 Pa. St. 207; Central Branch U. P. R. R. Co. v. Atchison, T. & S. F. R. R. Co., 28 Kan. 453; Seacomb v. Milwaukee etc. R. R. Co., 49 How. Pr. 75; Swan v. Williams et al., 2 Mich. 427. In the last case the court say: "It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion courts will not interfere." Wilkin v. First Div. of St. Paul & Pacific R. R. Co., 16 Minn. 271; Weir v. St. Paul, Stillwater & Taylor's Falls R. R. Co., 18 Minn. 155; Roanoke City v. Berkowitz, 80 Va. 616; post, § 238.

<sup>5</sup> Van Wilson v. Gutman, 79 Md. 405, 29 Atl. Rep. 608.

<sup>6</sup> Kansas City v. Marsh Oil Co., 140 Mo. 458.



eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature.<sup>7</sup> "When the use is public, the necessity or expediency of appropriating any

- <sup>7</sup> Aldridge v. Tuscumbia, Courtland & Decatur R. R. Co., 2 Stew. & Por. 199; Sadler v. Langham, 34 Ala. 311; Gilmer v. Lime Point, 18 Cal. 229; Sherman v. Brick, 32 Cal. 241; Lent v. Tillson, 72 Cal. 404; White-man's Executrix v. Wilmington & Susquehanna R. R. Co., 2 Harr. (Del.) 514; Parham v. Justices etc. of Decatur County, 9 Ga. 341; Chicago, Rock Island & Pacific R. R. Co. v. Town of Lake, 71 Ill. 333; Water Works Co. v. Burkhardt, 41 Ind. 364; Bankhead v. Brown, 25 Ia. 540; Cherokee v. The S. C. & I. F. Town Lot & Land Co., 52 Ia. 279; Challiss v. Atchison, T. & S. F. R. R. Co., 16 Kan. 117, 126; Talbot v. Hudson, 16 Gray, 417, 424; Haverhill Bridge Props. v. County Coms. of Essex, 103 Mass. 120; Swan v. Williams, 2 Mich. 427; Dickey v. Tension, 27 Mo. 373; Coster v. Tide Water Co., 18 N. J. Eq. 54 and 518; Beekman v. Saratoga & Schenectady R. R. Co., 3 Paige, 45; Harris v. Thompson, 9 Barb. 350; Buffalo & New York R. R. Co. v. Brainard, 9 N. Y. 100; People v. Smith, 21 N. Y. 595; Matter of William A. Fowler, 53 N. Y. 60; Matter of Deansville Cemetery Ass., 5 Hun 482; Anderson v. Turbeville, 6 Coldw. 150; Tyler v. Beacher, 44 Vt. 648; Roanoke City v. Berkowitz, 80 Va. 616; Tait's Executor v. Central Lunatic Asylum (Va.), 4 S. E. Rep. 697; Baltimore & Ohio R. R. Co. v. Pittsburg, Wheeling & Ky. R. R. Co., 17 W. Va. 812; Smeaton v. Martin, 57 Wis. 364; Moran v. Ross, 79 Cal. 159, 21 Pac. Rep. 547; Wulzen v. Board of Suprs., 101 Cal. 15, 35 Pac. Rep. 353; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. Rep. 1062; Holt v. Somerville, 127 Mass. 408; State Park Comrs. v. Henry, 38 Minn. 266, 36 N. W. Rep. 874; State v. Rapp, 39 Minn. 65, 38 N. W. Rep. 926; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. Rep. 325; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. Rep. 38; City of Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. Rep. 933; Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559; Paxton etc. Irr. Canal & L. Co. v. Farmers' etc. Irr. & L. Co., 45 Neb. 884, 64 N. W. Rep. 343; State v. City of Orange, 54 N. J. L. 111, 22 Atl. Rep. 1004; Matter of Niagara Falls & W. R. R. Co., 108 N. Y. 375, 15 N. E. Rep. 429; Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. Rep. 601; Call v. Wilkesboro, 115 N. C. 337, 20 S. E. Rep. 468; Dalles Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. Rep. 78; Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. Rep. 1077; State v. Stewart, 74 Wis. 620, 43 N. W. Rep. 947; Wisconsin Water Co. v. Winans, 85 Wis.

particular property is not a subject of judicial cognizance."<sup>8</sup> "The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government."<sup>9</sup> The question of necessity is sometimes confounded with that of public use,<sup>10</sup> and it has sometimes been maintained that the exercise of the power of eminent domain must be founded on a public necessity.<sup>11</sup> But we

26, 54 N. W. Rep. 1003; *St. Louis etc. R. R. Co. v. Thomas*, 34 Fed. Rep. 774; *Thomas v. Mill-edgeville R. R. Co.*, 99 Ga. 714; *Chicago & A. R. R. Co. v. Pontiac*, 169 Ill. 155; *Stewart v. Great Northern R. R. Co.*, 65 Minn. 515. 68 N. W. Rep. 208; *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205; *Apex Transportation Co. v. Garbade*, 32 Or. 582; *Bennett v. Marlon*, 106 Ia. 628, 76 N. W. Rep. 844; *People v. Adirondack R. R. Co.*, 160 N. Y. 225; *Baughman v. Heinzelman*, 180 Ill. 251; *Howard v. Board of Supervisors*, 54 Neb. 443, 74 N. W. Rep. 953.

"It is not indispensable that the legislature shall determine that any given enterprise is necessary or proper, before putting in operation the power of eminent domain. This power is primarily an absolute one, and theoretically exists in this absolute form in the ultimate source of authority in every organized society. In the constituted government of this State, the right of exercising it has been confided to the legislature, restricted by only two conditions: one,

that compensation shall be made to the owner of the property taken; the other, that the use for which property may be taken shall be a public use. In other respects it is without limit. Whether the purpose to be subserved be necessary or wise, is for the legislature alone." *Ct. of Errors and Appeals in National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755, 763.

<sup>8</sup> *Boom Co. v. Patterson*, 98 U. S. 403, 406. Similar language will be found in the following cases: *Geisy v. Cincinnati, Wilmington & Zanesville R. R. Co.*, 4 Ohio St. 308; *County Court v. Griswold*, 58 Mo. 175; *Chicago & Eastern Ill. R. R. Co. v. Wiltse*, 116 Ill. 449; *Towns v. Klamath County*, 33 Or. 225, 233; and in many of the cases cited in the last note.

<sup>9</sup> *Matter of Niagara Falls & Whirlpool R. R. Co.*, 108 N. Y. 375, 383, 15 N. E. Rep. 429.

<sup>10</sup> *Ante*, § 162.

<sup>11</sup> *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. Rep. 92. In this case money had been given to a town for a public library to be managed and controlled by a

know of no case in which it has been adjudicated that an appropriation of private property for a recognized public use, or an authority to make such appropriation, was void because, in the opinion of the court, there was no necessity for an exercise of the eminent domain power.

§ 239. When the power of eminent domain has been delegated, the propriety of its exercise rests with the grantee.—When authority to take property for public use has been conferred by the legislature, it rests with the grantee to determine whether it shall be exercised, and when and to what extent it shall be exercised,<sup>12</sup> provided, of course, that the power is not exceeded or abused. These questions are po-

board of trustees consisting of the selectmen, the school committee and settled ministers of the place. The legislature afterwards created a corporation, to be managed and controlled by a different body, and directed the transfer of the property to this corporation. The act also provided for the acquisition of the property by the new corporation under the power of eminent domain. After the transfer the property was to be used in the same manner and for the same purposes as before. The court appears to hold that so much of the act as provided for the acquisition of the property under the eminent domain power, was invalid, because the proposed taking was not founded on a public necessity. "Property can be taken in this way only in the exercise of the paramount right of the government, founded on a public necessity. \* \* \* The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same

manner for precisely the same public use, can be authorized under the constitution. Can such a taking be founded on a public necessity? \* \* \* In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the legislature to say whether in a particular case the necessity exists. We are of opinion, that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the legislature to be, a matter of public necessity." The true ground and reason of this decision would seem to be that an act which merely accomplishes the transfer of property from one owner to another, does not subserve any public purpose and is not, therefore, a public use.

<sup>12</sup> Chicago & Eastern Ill. R. R. Co. v. Wiltse, 116 Ill. 449, 454;

litical in their nature, and not judicial. Thus, whether a particular road or street shall be laid out,<sup>13</sup> or an existing street widened,<sup>14</sup> or any similar improvement made,<sup>15</sup> in the absence of any special statutory provisions, rests entirely with the local authorities vested with power in the premises.<sup>16</sup> The courts cannot inquire into the motives which actuate the authorities or into the propriety of making the particular improvements.<sup>17</sup> The same may be said of individuals and corporations vested with the power of eminent domain and acting from considerations of private emolument.<sup>18</sup> But an abuse of the discretion and authority con-

Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. Rep. 953; Bass v. City of Ft. Wayne, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173; Williams v. Cary, 73 Ia. 194, 34 N. W. Rep. 813; Barrett v. Kemp, 91 Ia. 296, 59 N. W. Rep. 76; Matter of Union El. R. R. Co., 113 N. Y. 275, 21 N. E. Rep. 81; Pennsylvania R. R. Co. v. Diehm, 128 Pa. St. 509, 18 Atl. Rep. 522; Schuster v. Sanitary District, 177 Ill. 626, 52 N. E. Rep. 855.

<sup>13</sup> Commission's Court of Lowndes Co. v. Bowie, 34 Ala. 461; Harwinton v. Catlin, 19 Conn. 520; Dunlap v. Mount Sterling, 14 Ill. 251; Curry v. Mount Sterling, 15 Ill. 320; Lawliss v. Reese, 4 Bibb, 309; Baldwin v. Bangor, 36 Me. 518; Methodist Church v. Baltimore, 6 Md. 391; State v. Bishop, 39 N. J. L. 226; West River Bridge Co. v. Dix, 16 Vt. 446; Gallup v. Woodstock, 29 Vt. 347; City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. Rep. 224; Borough of Stonington v. States, 31 Conn. 213; Knoblauch v. Minneapolis, 56 Minn. 321, 57

N. W. Rep. 928; City of Kansas v. Baird, 98 Mo. 215, 11 S. W. Rep. 242, 562; State v. Engleman, 106 Mo. 628, 17 S. W. Rep. 759; Symons v. San Francisco, (Cal.) 42 Pac. Rep. 913; Chicago etc. R. R. Co. v. Pontiac, 169 Ill. 155; English v. Danville, 170 Ill. 131; Matter of Folts Street, 18 App. Div. N. Y. 568.

<sup>14</sup> Dunham v. Hyde Park, 75 Ill. 371; Gilbert v. New Haven, 39 Conn. 467.

<sup>15</sup> Kelsey v. King, 32 Barb. 410; Stout v. Freeholders, 25 N. J. L. 202; Iron R. R. Co. v. Ironton, 19 Ohio St. 299; Wulzon v. Board of Suprvs., 101 Cal. 15, 35 Pac. Rep. 353; Lynch v. Forbes, 161 Mass. 302, 37 N. E. Rep. 437; Sample v. Carroll, 132 Ind. 496, 32 N. E. Rep. 220.

<sup>16</sup> Cases apparently holding a contrary doctrine are, White's Case, 2 Overton, 109; Lecoul v. Police Jury, 20 La. An. 308.

<sup>17</sup> Dunham v. Hyde Park, 75 Ill. 371, and cases already cited.

<sup>18</sup> Gates v. Boston etc. R. R. Co., 53 Conn. 333; O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. Rep. 923; St. Paul v. Nickl, 42 Minn. 262, 44 N.

ferred by eminent domain statutes, may be prevented or redressed by the courts.<sup>19</sup>

§ 240. The authority to condemn must be expressly given.—The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication.<sup>20</sup> If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be acquired by contract.<sup>21</sup> Thus the authority to construct and maintain booms,<sup>22</sup> or bridges,<sup>23</sup> does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the legislature did not intend that the power

W. Rep. 59; *Matter of Union Elevated R. R. Co.*, 113 N. Y. 275, 21 N. E. Rep. 81; *Norton v. Wallkill etc. R. R. Co.*, 42 How. Pr. 228; *Pennsylvania R. R. Co. v. Diehm*, 128 Pa. St. 509, 18 Atl. Rep. 522; *Colorado Eastern R. R. Co. v. Union Pac. R. R. Co.*, 41 Fed. Rep. 293; *Douglass v. Byrnes*, 59 Fed. Rep. 29.

<sup>19</sup> *Williams v. Carey*, 73 Ia. 194, 34 N. W. Rep. 813; *Pennsylvania R. R. Co. v. Diehm*, 128 Pa. St. 509, 18 Atl. Rep. 522. And see ante § 206.

<sup>20</sup> *Schmidt v. Densmore*, 42 Mo. 225; *Allen v. Jones*, 47 Ind. 438; *Butler v. Thomasville*, 74 Ga. 570; *Perry v. Wilson*, 7 Mass. 393; *Miami Coal Co. v. Wighton*, 19 Ohio St. 560; *State ex rel. v. Salem Water Co.*, 5 Ohio C. C. 58; *City of Tacoma v. State*, 4 Wash. 64, 29 Pac. Rep. 847; *United States v. Rauers*, 70 Fed. Rep. 748. "In favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the

grant itself will be defeated. It must, also, be a necessity which arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy." *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150, 159. For a case where the company was held estopped to deny power to condemn, see *Parsons Water Co. v. Knapp*, 33 Kan. 752.

<sup>21</sup> *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Leeds v. Richmond*, 102 Ind. 372.

<sup>22</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 323; *Perry v. Wilson*, 7 Mass. 393; *The Stevens Point Boom Co. v. Reilly*, 44 Wis. 295.

<sup>23</sup> *Thatcher v. The Dartmouth Bridge Co.*, 18 Pick. 501; *Payne v. Kansas & A. R. R. Co.*, 46 Fed. Rep. 546. But where power was given to construct a bridge coupled with a provision for the

of eminent domain should be exercised.<sup>24</sup> A city had power to construct and regulate sewers, drains and cisterns, also to provide on what terms real estate in such city might be drained by means of surface or under drains over and across other real estate therein. It was held that neither provision gave power to condemn.<sup>25</sup> A statute in relation to Detroit gave power to open, extend, widen or straighten streets or alleys. A subsequent provision as to compensation omitted the case of widening. It was held that the power to widen could not be exercised by condemnation.<sup>26</sup> Statutory authority to lay out and establish streets, alleys and avenues, was held not to confer the power to condemn land for such purposes.<sup>27</sup> In this case there was no general law to which the city in question could resort, and it attempted to provide by ordinance a mode of condemnation. But where a county board of supervisors was empowered to build and keep in repair county buildings and to provide suitable rooms for the use of the county, it was held that this was sufficient authority to condemn land for a court house.<sup>28</sup> In another case, where commissioners were empowered to select a site for a city hall, either certain lands owned by the city or any other lands, and to cause a city hall to be erected thereon, it was held by the Court of Appeals of New York, that, in case land not owned by the city had been selected, there would have been no power to condemn, and, if the commissioners could not have agreed with the owner, they could have proceeded no further in the matter.<sup>29</sup> As a rule, a municipal corporation cannot con-

ascertainment of damages for property taken therefor, the right to condemn was held to be necessarily implied. *Linton v. Sharpsburg Bridge Co.*, 1 Grant's Cases, 414.

<sup>24</sup> *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Chaffee's Appeal*, 56 Mich. 244; *In re Manderson*, 51 Fed. Rep. 501, 2 C. C. A. 490; *In re Montgomery*, 48 Fed. Rep. 896.

<sup>25</sup> *Allen v. Jones*, 47 Ind. 438; see also *Leeds v. Richmond*, 102 Ind. 372.

<sup>26</sup> *Chaffee's Appeal*, 56 Mich. 244.

<sup>27</sup> *City of Tacoma v. State*, 4 Wash. 64, 29 Pac. Rep. 847.

<sup>28</sup> *Supervisors of Culpepper County v. Gorrell*, 20 Gratt. 484.

<sup>29</sup> *People ex rel. Hayden v. City of Rochester*, 50 N. Y. 525.

demn property beyond its limits, unless authority to do so is expressly given.<sup>30</sup> The rule that the power to condemn is not to be implied, is further illustrated in subsequent sections which treat of the construction of statutes giving authority to condemn.<sup>31</sup> No general rule can be laid down as to when the right to condemn will be implied or inferred, and when not. Such implication will more readily be made in favor of public corporations exercising powers solely for the public use and benefit than in favor of private individuals or corporations organized for pecuniary profit.<sup>32</sup>

§ 241. **How the authority may be given.**—This is purely a matter of legislative discretion, unless limited by the constitution. The authority may be given by a special act to a particular person or corporation, or by a general act or general incorporation laws.<sup>33</sup> Municipal corporations may be authorized to make certain improvements, or compelled to do so, in the discretion of the legislature.<sup>34</sup>

§ 242. **To whom authority may be given.**—Strictly speaking, the legislature cannot delegate the power of eminent

<sup>30</sup> *Houghton v. Huron Copper Co.*, 57 Mich. 547; *Drain Commissioners v. Baxter*, 57 Mich. 127. See also *Warner v. Town of Gunnison*, 2 Col. App. 430, 31 Pac. Rep. 238, where, however, the power was held to have been conferred.

<sup>31</sup> Post, §§ 245-258.

<sup>32</sup> Quoted and approved in *Leltzsey v. Columbia Water Power Co.*, 47 S. C. 464. The following additional cases are referred to on the question of what language is sufficient to confer the power of eminent domain; *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.*, 17 Conn. 454; S. C. 17 Conn. 40; *Commissioners v. Judges of Queens County*, 17 Wend. 9; *City of Springville v. Fullmer*, 7 Utah 450, 27 Pac.

Rep. 577; *Rahn Tp. v. Tamaque etc. R. R. Co.*, 4 Pa. Dist. Ct. 29; *Matter of Rochester Electric R. R. Co.*, 57 Hun 56, 10 N. Y. Supp. 379; *State v. Salem Water Co.*, 5 Ohio C. C. 58; *State v. City of Newark*, 54 N. J. L. 62, 23 Atl. Rep. 129.

<sup>33</sup> *Weir v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*, 18 Minn. 155; *Buffalo & New York R. R. Co. v. Brainard*, 9 N. Y. 100; *Central R. R. Co. v. Penn. R. R. Co.*, 31 N. J. Eq. 475; *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755; *De Witt v. Duncan*, 46 Cal. 342; *Moran v. Ross*, 79 Cal. 159, 21 Pac. Rep. 547.

<sup>34</sup> *Matter of Sixth St.*, 11 Philadelphia 414.

domain.<sup>35</sup> It cannot divest itself of sovereign powers. But, in exercising the power, it can select such agencies as it pleases, and confer upon them the right to take private property subject only to the limitations contained in the constitution.<sup>36</sup> Accordingly it has been held that the right may be conferred upon corporations, public<sup>37</sup> or private,<sup>38</sup>

<sup>35</sup> *Sholl v. German Coal Co.*, 118 Ill. 427; *Brewster v. Hough*, 10 N. H. 138. Nor can a municipal corporation bind itself by an agreement not to exercise the power of eminent domain with which it is vested. *Matter of Opening First St.*, 66 Mich. 42, 33 N. W. Rep. 15.

<sup>36</sup> *Yost's Report*, 17 Pa. St. 524; *Matter of Deansville Cem. Ass.* 5 Hun 432; *State v. Rapp*, 39 Minn. 65, 38 N. W. Rep. 926; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 54 N. W. Rep. 1003. In *State v. Rapp*, 39 Minn. 65, 38 N. W. Rep. 926, the court says: "The manner of the exercise of this right is, except as to compensation, unrestricted by the constitution, and addresses itself to the legislature as a question of policy, propriety, or fitness, rather than of power. They are under no obligation to submit the question to a judicial tribunal, but may determine it themselves, or delegate it to a municipal corporation, to a commission, or to any other body or tribunal they see fit."

<sup>37</sup> *State v. Rapp*, 39 Minn. 65, 38 N. W. Rep. 926; *Winona etc. R. R. Co. v. City of Watertown*, 4 S. D. 323, 56 N. W. Rep. 1077; *Matter of Thompson*, 57 Hun 419, 10 N. Y. Supp. 705; *Spring City Gas Light Co. v. Pennsylvania*

*S. V. R. R. Co.*, 167 Pa. St. 6, 31, Atl. Rep. 363.

<sup>38</sup> *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9; *L. C. & C. R. R. Co. v. Chappell*, Rice (S. C.) 383; *Ash v. Cummings*, 50 N. H. 591; *Concord R. R. Co. v. Greeley* 17 N. H. 47; *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479; *Hand Gold Mining Co. v. Parker*, 59 Ga. 419; *Mims v. Macon & Western R. R. Co.*, 3 Ga. 333; *Buffalo City R. R. Co. v. Brainard*, 9 N. Y. 100; *Boom Co. v. Patterson*, 98 U. S. 403; *New York etc. R. R. Co. v. Long*, 69 Conn. 424; *Fort St. Union Depot Co. v. Morton*, 83 Mich. 265, 47 N. W. Rep. 228, 3 Am. R. R. & Corp. Rep. 438; *Matter of Union El. R. R. Co.*, 113 N. Y. 275, 21 N. E. Rep. 81. In the last case it is said: "Much has been said upon this subject of the exercise of the right of eminent domain by private corporations, and it is not necessary to dwell upon it here at any length. The right resides in the State at any time to resume the possession of private property for public use, upon just compensation being made. What it can thus do directly, it may, in the furtherance of a public purpose, delegate the right to do to a corporation, which has been created to subserve some supposed public con-



upon individuals,<sup>39</sup> upon foreign corporations,<sup>40</sup> or a consolidated company composed in part of a foreign corporation,<sup>41</sup> and upon the federal government.<sup>42</sup> Such has been the common practice since the Revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that, in the absence of special constitutional restriction, it is solely for the legislature to judge what persons, corporations or other agencies may properly be clothed with this power.<sup>43</sup> Some State constitutions prohibit the exercise of the power by foreign corporations.<sup>44</sup> A proceeding by a foreign corporation as lessee of a domestic corporation, was held within the prohibition by the Nebraska Supreme Court.<sup>45</sup> Proceedings instituted in violation of the provision should be dismissed

venience or necessity, and thus becomes invested with a quasi public character." Compare *People v. Salem*, 20 Mich. 452.

<sup>39</sup> *Moran v. Ross*, 79 Cal. 159, 21 Pac. Rep. 547; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Matter of Petition of Kerr*, 42 Barb. 119; also cases in last note. Compare *Finney v. Sommerville*, 80 Pa. St. 59.

<sup>40</sup> *Matter of Peter Townsend*, 39 N. Y. 171; *New York & Erie R. R. Co. v. Young*, 33 Pa. St. 175; *Dodge v. Council Bluffs*, 57 Ia. 560; *Morris Canal & Banking Co. v. Townsend*, 24 Barb. 653; *Abbott v. New York etc. R. R. Co.*, 145 Mass. 450; *Gray v. St. Louis & San Francisco Ry. Co.*, 81 Mo. 126; *St. Louis etc. R. R. Co. v. Lewsight*, 113 Mo. 660, 21 S. W. Rep. 210; *New York etc. R. R. Co. v. Welsh*, 143 N. Y. 411, 38 N. E. Rep. 378. In Iowa it was held that, though a foreign corporation did not have power to condemn land in that State, a do-

mestic company, organized at the instance of a foreign company, could condemn land for the purpose of leasing it to such foreign corporation. *Lower v. Chicago & Quincy R. R. Co.*, 59 Ia. 563. The Iowa statute conferred power upon "railroad corporations organized under the laws of this State;" held, necessarily, a denial of the right to foreign corporations. *Holbert v. St. Louis, K. C. & N. R. R. Co.*, 45 Ia. 23.

<sup>41</sup> *Toledo, A. A. & G. Ry. Co. v. Dunlap*, 47 Mich. 456; *Trester v. Missouri Pac. R. R. Co.*, 53 Neb. 171, 49 N. W. Rep. 1110.

<sup>42</sup> *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *Gilmer v. Lime Point*, 18 Cal. 229.

<sup>43</sup> *Ash v. Cummings*, 50 N. H. 591; and cases cited in note 36.

<sup>44</sup> *Ante*, §§ 16, 36.

<sup>45</sup> *State v. Scott*, 22 Neb. 628. And see *Koenig v. C. B. & Q. R. R. Co.*, 27 Neb. 699, 43 N. W. Rep. 423.

whenever the fact appears.<sup>46</sup> A prohibition that a foreign corporation may not "condemn or appropriate" lands, was held not to prevent its acquiring property by agreement.<sup>47</sup> And where land has been acquired by violation of such a provision, one who has accepted the compensation awarded, is estopped from questioning the company's title,<sup>48</sup> and the title has been held to be good against all except the State.<sup>49</sup> It has been argued that the prohibition would apply to a corporation created by congress,<sup>50</sup> and this would doubtless be true if it had no express authority to condemn. But congress may create a corporation with power to condemn property in a State, for a purpose within its constitutional powers, as in aid of interstate commerce, despite any prohibition, contained in the constitution or laws of the State.<sup>51</sup> It is, of course, competent for the legislature to appropriate property directly, by an act duly passed, instead of conferring authority to do so, and this has occasionally been done.<sup>52</sup> The receiver of a corpora-

<sup>46</sup> *Trester v. Missouri Pac. R. Co.*, 23 Neb. 242, 36 N. W. Rep. 502.

<sup>47</sup> *St. Louis etc. R. R. Co. v. Foltz*, 52 Fed. Rep. 627.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Myers v. McGavock*, 39 Neb. 843, 58 N. W. Rep. 522.

<sup>50</sup> *Ibid.*

<sup>51</sup> *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 39; *Mining Co. v. Pennsylvania*, 125 U. S. 181, 186, 8 S. C. Rep. 737; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 12; 6 Am. R. R. & Corp. Rep. 607 et seq.

<sup>52</sup> *Baltimore & Ohio R. R. Co. v. B. W. & Ky. R. R. Co.*, 17 W. Va. 812, 841; *Mims v. Macon & Western R. R. Co.*, 3 Ga. (3 Kelly) 333; *Smedley v. Erwin*, 51 Pa. St. 445; *In re Towanda Bridge Co.*, 91 Pa. St. 216; *Hing-*

*ham & Quincy Bridge & Turnpike Co. v. County of Norfolk*, 6 Allen, 353; *Boom Co. v. Patterson*, 98 U. S. 403; *Township of Mahoney v. Comry*, 103 Pa. St. 362; *Matter of Union Ferry Co.*, 98 N. Y. 139; *Matter of Application of Mayor etc. of New York*, 99 N. Y. 569 (affirming 34 Hun, 441); *Genet v. Brooklyn*, 99 N. Y. 296; *Delap v. City of Brooklyn*, 3 Misc. 22, 22 N. Y. Supp. 179; *United States v. Harris*, 1 Sumner, 21; *Matter of Department of Public Works*, 53 Hun, 280, 25 N. Y. St. 9, 6 N. Y. Supp. 750; *State v. Hogue*, 71 Wis. 384, 36 N. W. Rep. 860; *McCormack v. City of Brooklyn*, 108 N. Y. 49, 14 N. E. Rep. 808; *State v. Spencer*, 53 Kan. 655, 37 Pac. Rep. 174; *State v. Collis*, 20 App. Div. N. Y. 341.

tion invested with the power may exercise it, when authorized to do so by the court.<sup>53</sup>

§ 243. Delegation and transfer of authority by grantees of the legislature: Contractors and agents: Receivers.—When authority to take property by virtue of the power of eminent domain is conferred by the legislature, it becomes a personal trust, and cannot be delegated or transferred, except by legislative sanction.<sup>54</sup> Purchasers under a mortgage,<sup>55</sup> grantees<sup>56</sup> or lessees<sup>57</sup> of the property and franchises

<sup>53</sup> *Morrison v. Forman*, 177 Ill. 427, 53 N. E. Rep. 73, in which the court says: "A court of equity having in charge the property of a railroad company is authorized to do any act within the corporate power the performance of which is necessary to preserve the property of the company for the benefit of the company and its creditors. If, when property comes into the hands of the court, the corporation is engaged in some proper and legitimate undertaking the completion whereof is essential to the successful maintenance and operation of the road and to the preservation of the property, the court may proceed to complete the undertaking, and if required will transfer to and clothe its receiver with such power and authority as the corporation possessed to institute the appropriate legal proceedings to condemn any real estate which ought to be acquired in order to finish and make useful and available that which the corporation was engaged in constructing when the court displaced it in the possession of its property." p. 430.

<sup>54</sup> *Harris v. Inhabitants of Marblehead*, 10 Gray, 40; *Stewart's Appeal*, 56 Pa. St. 413; *Lyon v.*

*Jerome*, 26 Wend. 485, reversing S. C. in 15 Wend. 569. "This is an exceedingly delicate and important power, and only exists in the State by virtue of her right of eminent domain as sovereign. In expressly granting this power, a confidence in the grantee of the power, as to its exercise, is implied. It cannot, therefore, be delegated. It must be exercised by the grantee in person, and not by proxy or substitute. The commissioner can act by others. He must judge himself. He only can decide upon the necessity or expediency in any case of appropriating private property to public use; but he may employ his subordinate officers or agents to carry such decision into effect. *Lyon v. Jerome*, 26 Wend. 485, 498.

<sup>55</sup> *Atkinson v. Marietta R. R. Co.*, 15 Ohio St. 21.

<sup>56</sup> *Mahoney v. Spring Valley Water Works*, 52 Cal. 159; *Abbott v. New York & N. E. R. R. Co.*, 145 Mass. 450. In the last of these cases the court reviews a number of acts from which an intent that the power to condemn should pass with the property and franchises of a railroad was inferred.

<sup>57</sup> *Worcester v. Norwich &*

of a corporation authorized to condemn property for public use, cannot, by virtue of such purchase, grant or lease, exercise such power. Being a personal trust, the power must be exercised by the grantee in person,<sup>58</sup> and, in case of corporations, by the governing body of the corporation, which ordinarily is the board of directors.<sup>59</sup> From these principles it follows that, where corporations, or others who are empowered to take materials for the construction of works, employ contractors who engage to furnish their own materials, the power of eminent domain does not pass to the contractors by virtue of the contract, but they must provide their materials as best they can.<sup>60</sup> A city, having power to

Worcester R. R. Co., 109 Mass. 103; *Lewis v. Germantown etc. R. R. Co.*, 16 Phila. 608; *Barker v. Hartman Steel Co.*, 6 Pa. Co. Ct. 183; *Hespenhelde's Appeal*, 4 Penn. 71.

<sup>58</sup> *Lyon v. Jerome*, 26 Wend. 485.

<sup>59</sup> *Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125, 130.

<sup>60</sup> *Schmidt v. Densmore*, 42 Mo. 225; *Lyon v. Jerome*, 26 Wend. 485; *St. Peter v. Dennison*, 58 N. Y. 416. A contrary doctrine is maintained in Illinois. *Hinde v. Wabash Navigation Co.*, 15 Ill. 72; *Lesh v. The Wabash Navigation Co.*, 14 Ill. 85. In this case, however, there appears to have been a resolution of the canal commissioners authorizing the appropriation, but the court disregarded it in their decision. In *Vermont Central R. R. Co. v. Baxter*, 22 Vt. 365, it was held that one, who contracted to build a section of road and to furnish all materials, necessarily took the company's power to appropriate them in invitum, and that the company was liable directly to

the owner therefor. The statute in that case provided that, where a railroad company had by its engineers, agents or servants taken any materials from contiguous lands for use in the construction of its road, and had failed to have the damages therefor assessed within two years, the owner might have his common law remedy therefor. (§ 30, C. 26 Compiled Stats. 1850). The court held that the contractors were agents or servants within the statute. *Bliss v. Hosmer*, 15 Ohio, 44, may also seem at first blush to be opposed to the text. That was trespass against the contractor on a canal for taking materials, and judgment was given for the defendant. The statute provided that the commissioners and any agent, superintendent and engineer employed by them might enter on private property and take materials. The contract provided that the contractors should furnish their own materials, but, if they could not obtain them at a fair price, the commissioners or their engineer would give an order for

condemn property for water works, cannot, by a contract with a water company which has no such power, confer upon the latter the power of condemnation.<sup>61</sup>

§ 244. A lease of the property and franchises of a corporation does not destroy its right to condemn.<sup>62</sup>—This is true though the term of the lease is for the entire life of the corporation.<sup>63</sup> The lease is but a mode of enabling the corporation to discharge its duties to the public, and the necessities of further condemnations would be the same, whether the duties which the corporation owes to the public are discharged by the corporation directly, or by its lessee.<sup>64</sup>

§ 245. The manner of proceeding may be changed at the pleasure of the legislature.—It is no part of the contract between the State and a corporation vested with the power of eminent domain, that the mode of condemning property shall remain unchanged.<sup>65</sup> Consequently the tribunal to assess damages may be changed,<sup>66</sup> jurisdiction may be transferred from one court to another<sup>67</sup> and a right of appeal may be granted where none existed before.<sup>68</sup> These

appropriating them. An order was, in fact, given by the engineer to take the materials in question. In this case, therefore, the statute expressly authorized any agent or engineer of the commissioners to enter and take materials, which differs materially from the case of *Lyon v. Jerome*, ante. Such a contract, however, does not prevent the corporation or principal from appropriating materials by condemnation for the benefit of the contractor. *Ten Broeck v. Sherry*, 71 N. Y. 276.

<sup>61</sup> *State v. Salem Water Co.*, 5 Ohio C. C. 58.

<sup>62</sup> *Matter of New York, Lackawanna & Western Ry. Co.*, 35 Hun 220, affirmed in 99 N. Y. 12.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Klip v. New York & Harlem*

*R. R. Co.*, 67 N. Y. 227; *Deltichs v. Lincoln & Northwestern R. R. Co.*, 13 Neb. 361; *Chicago & Western Indiana R. R. Co. v. Illinois Central R. R. Co.*, 113 Ill. 156.

<sup>65</sup> *Long's Appeal*, 87 Pa. St. 114; *Mississippi R. R. Co. v. McDonald*, 12 Helsk. 54; *Springfield etc. R. R. Co. v. Hall*, 67 Ill. 99; *McCrea v. Port Royal R. R. Co.*, 3 S. C. 381; *Cowan v. Penobscott R. R. Co.*, 44 Me. 140; *Balt. & Susquehanna R. R. Co. v. Nesbit*, 10 How. 395; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157.

<sup>66</sup> *Chesapeake & Ohio R. R. Co. v. Patton*, 9 W. Va. 648.

<sup>67</sup> *United Railroad & Canal Co. v. Weldon*, 47 N. J. L. 59.

<sup>68</sup> *Farnum's Petition*, 51 N. H. 376; *Long's Appeal*, 87 Pa. St. 114.

and like matters relate to the remedy which, according to well settled principles, may be changed without impairing existing contracts, provided no substantial right secured by the contract is impaired. The substantial right in the case under consideration is the right to take private property by compulsory proceedings.<sup>69</sup>

§ 246. **The right to impose additional liabilities.**—The charter of a corporation being a contract, the right secured by it cannot be impaired by subsequent legislation. A statute imposing upon such corporations a liability for consequential damages to property by reason of works already executed, where no such liability existed before, has accordingly been held to be unconstitutional and void.<sup>70</sup> If the right to repeal, alter or amend such charter is reserved, a liability for consequential damages as to the future may undoubtedly be imposed.<sup>71</sup> Whatever may be the limitation of the right so reserved, it is certain that, under it, the legislature has the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed, and to impose any reasonable duties and obligations upon the corporation. To make the corporation liable for consequential damages to private property as to any future works by it constructed, or any future exercise by it of the power of eminent domain, would certainly be reasonable, for it is but just that such a corporation should make good to an individual any loss sustained by him in respect of his property by reason of the exercise of the corporate powers. Where the right to occupy the streets of a city is granted to a railroad corporation by the municipality, such right is subject to any con-

<sup>69</sup> *McCrea v. Port Royal R. R. Co.*, 3 S. C. 381

<sup>70</sup> *Bailey v. Philadelphia, Wilmington & Balt. R. R. Co.*, 4 Harr. (Del.) 389; *Towle v. Eastern R. R. Co.*, 18 N. H. 547; *Monongahela Navigation Co. v. Coon*, 6 Pa. St. 379.

<sup>71</sup> *Monongahela Nav. Co. v. Blair*, 20 Pa. St. 71; *Northern*

*Central R. R. Co. v. Holland*, 117 Pa. St. 613, 12 Atl. Rep. 575; *Pierce on Railways*, p. 456; *Parker v. Metropolitan Ry. Co.*, 109 Mass. 506; *Shields v. Ohio*, 95 U. S. 319, 324; *Worcester v. Norwich & Worcester R. R. Co.*, 109 Mass. 103; *Portland & Oxford Central R. R. Co. v. Grand Trunk Ry. Co.*, 46 Me. 69.

ditions which may be imposed by general law prior to its exercise. Where the right to lay a double track in a street was granted to a corporation, and after one track was laid a law was passed requiring compensation to be made to abutting owners for damages occasioned by laying railroads in streets, it was held the second track could not be laid without making compensation as required by the act.<sup>72</sup>

Whether such corporations can be subjected to additional liabilities as to future exercises of the power of eminent domain or future improvements of property already condemned, when no right to alter, repeal or amend their charter is reserved, is a question of great importance, because upon its solution depends the efficacy, as to such corporations, of the constitutional and statutory provisions giving compensation for property damaged or injured, as well as for property taken. In Pennsylvania it is held that such liability can be imposed without impairing the obligation of the charter.<sup>73</sup> The reasoning of the court is as follows: "The constitution of the United States undoubtedly precludes a State from impairing the obligation of a charter even through an amendment of its organic law; but this restriction has never been held to forbid such remedial legislation as may be requisite to give effect to antecedent rights, or provide a remedy for injuries that previously went unredressed. A child was entitled to support from its father at common law, but he could not recover damages for the frustration of this right through the parent's death from injuries occasioned by the negligence of an individual or body corporate. The act which now affords a remedy for such deprivations, and under which damages are constantly assessed and judgments rendered, is of recent origin, and was passed since the creation of the Penn-

<sup>72</sup> *Drady v. Des Moines & Ft. D. R. R. Co.*, 57 Ia. 393; *S. P., Mulholland v. D. M. & W. R. R. Co.*, 60 Ia. 740; To same effect; *Taylor v. Bay City St. R. R. Co.*, 80 Mich. 77, 45 N. W. Rep. 335.

<sup>73</sup> *Duncan v. Pennsylvania*

*Railroad Co.*, 94 Pa. St. 435, 443. See also *Patent v. Philadelphia etc. R. R. Co.*, 17 Phil. 291, affirmed by Supreme Court, 43 Legal. Intel. 79; *Northern Central R. R. Co. v. Holland*, 117 Pa. St. 613, 12 Atl. Rep. 575.

sylvania Railroad Company, and yet it has never, that I am aware of, been contended that it was invalid as to pre-existing corporations or impaired their chartered privileges. In like manner the citizen has a natural right to compensation, for the consequences of acts done for the public benefit that are injurious to his estate or person, and a statute which affords a remedy cannot justly be assailed as unconstitutional. Such an argument would obviously be fallacious if advanced on behalf of an individual, and the principle is the same when the defendant is a corporation. A power conferred by a charter cannot be abrogated without impairing the obligation of the contract; but the legislature does not, in making such a grant, contract that persons who are injuriously affected by the exercise of the power are not entitled to indemnity, nor that it will not provide a means for rendering their demand effectual. This may be tested by supposing the incorporation of a railway company in a State where, as was long the case in Rhode Island, there is no constitutional restraint on the right of eminent domain, and the subsequent enactment of a law providing that land should not be taken for the use of the road without payment. Would any one contend that such a statute impaired vested rights, or was within the prohibition of the constitution of the United States? If the question must be answered in the negative, the legislature might obviously proceed to give a remedy for property injured or destroyed." This ruling has since been approved by the supreme court of the United States.<sup>74</sup>

<sup>74</sup> *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75, 10 S. C. Rep. 34, 1 Am. R. R. & Corp. Rep. 15; affirming *S. C. Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 352, 5 Atl. Rep. 742. The court says: "Although it may have been the law in respect to the defendant, prior to the constitution of 1873, that under its charter, and the statutes in regard to it, it was not liable for such consequential

damages, yet there was no contract in that charter, or in any statute in regard to the defendant, prior to the constitution of 1873, that it should always be exempt from such liability, or that the State, by a new constitutional provision, or the legislature, should not have power to impose such liability upon it in cases which should arise after the exercise of such power. But



§ 247. **Effect of the repeal, amendment or expiration of statutes.**—The lapse of the time within which the compulsory powers conferred by a statute can be exercised puts an end to any further proceedings, as well as to the right to condemn.<sup>75</sup> Where the act imposes no limit, none can be imposed by construction.<sup>76</sup> Whether compulsory powers have expired or have otherwise been lost by delay or neglect, often becomes a question of difficulty. Where a railroad company was required to commence its road and expend ten per cent of its capital in five years and complete its road in a certain other period and in default of so doing the statute provided its corporate existence and powers should cease, and the company had done neither, it was held that the statute executed itself, that no proceedings of forfeiture were necessary, and that consequently it could not condemn after the periods specified had elapsed.<sup>77</sup> The same effect was given to a forfeiture clause, the words of which were, "This act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated."<sup>78</sup> On the other hand a provision in the charter of a bridge corporation that the bridge should be commenced within two years, "or this act and all rights and privileges granted hereby shall be null and void," was held not to be self-executing, and the corporation was permitted to condemn after the two years had expired.<sup>79</sup> Upon

the defendant took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation in respect of the subject matter involved."

<sup>75</sup> *Peavey v. Calais R. R. Co.*, 30 Me. 498; *Atlanta & Pacific R. R. Co. v. St. Louis*, 66 Mo. 228; *Morris & Essex R. R. Co. v. Cen-*

*tral R. R. Co.*, 31 N. J. L. 205; *New York, Housatonic & Northern R. R. Co. v. Boston, Hartford & Erie R. R. Co.*, 36 Conn. 196; *State v. Bergen Neck R. R. Co.*, 53 N. J. L. 108, 20 Atl. Rep. 762.

<sup>76</sup> *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 471.

<sup>77</sup> *Matter of Brooklyn etc. R. R. Co.*, 72 N. Y. 245, S. C. 55 How. Pr. 14.

<sup>78</sup> *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524.

<sup>79</sup> *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. Rep. 1088. After referring to the

the expiration or repeal of a statute all inchoate proceedings founded thereon fall to the ground,<sup>80</sup> unless there is

cases above cited the court says: "It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney general. In the case at bar the words of forfeiture are, 'All rights and privileges granted hereby shall be null and void.' It cannot be said that the words 'shall be null and void' disclose the legislative intent to make this clause self-executing. The words 'null and void,' as used in this connection, clearly mean voidable. The word 'void' is often used in an unlimited sense, implying an act of no effect, a nullity *ab initio*. *Inskeep v. Lecony*, 1 N. J. Law, 112. In the case at bar it was not so employed, but rather in its more limited meaning. We think these words mean no more than if the legislature had said, in case of default, the corporation 'shall be dissolved.' The attorney general was authorized to treat the charter of the bridge company as voidable, and by appropriate legal proceedings to have terminated its corporate existence. The supreme court of the United States, in passing upon the meaning of the words 'void and of no effect,' uses this language: 'But these words are often used in statutes and legal documents \* \* \* in the sense of 'voidable' merely,—that is,

capable of being avoided,—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances.' *Ewell v. Daggs*, 108 U. S. 148, 2 Sup. Ct. 408." Where an act provided for extending a street and directed the corporation counsel to commence proceedings therefore within three months, it was held the power was not lost by a neglect to proceed within the time limited. *Stevenson v. Mayor etc. of New York*, 3 N. Y. Supr. 133. A provision in a railroad charter that, if the road is not commenced and completed within a specified time, the company should forfeit all rights acquired under the act, can only be taken advantage of by the State. A failure to comply is no defense to condemnation proceedings. *Matter of Brooklyn El. R. R. Co.*, 125 N. Y. 434, 26 N. E. Rep. 474.

<sup>80</sup> *Williams v. County Comrs. of Lincoln County*, 35 Me. 345; *County of Menard v. Kincaid*, 71 Ill. 587; *Hatfield Township Road*, 4 Yeates, 392; *Hampton v. Commonwealth*, 19 Pa. St. 329; *Commonwealth v. Beatty*, 1 Watts, 382; *French v. Owen*, 5 Wis. 112; *Stephens v. Marshall*, 3 Chand. Wis. 222; *Pratt v. Brown*, 3 Wis. 603; *Brochlebank v. Whitehaven Junction Ry. Co.*, 15 Sim. 632; *Cohen v. Gray*, 70 Cal. 85; *State v. Passaic*, 36 N. J. L. 382; *Boyer's Petition*, 15 Pa. Co. Ct. 531; contra: *Burrows v. Vandevier*, 3

a saving clause in the repealing act.<sup>81</sup> The effect of a change or amendment of a statute pending proceedings under it must depend largely upon the circumstances of the particular case. If the right to condemn or the jurisdiction of the particular court or tribunal before which the proceedings are pending is taken away, the proceedings must necessarily fall to the ground; but if there is simply a change in the mode of procedure, then they may be continued under the new statute.<sup>82</sup> Where an amendatory act provides an unconstitutional method of assessing damages, the amendment is void and the original act remains in force, and proceedings had in accordance therewith are valid.<sup>83</sup> The charter of Sing Sing, passed in 1859, provided that the proceedings to lay out, open and widen streets should be according to the provisions of the Revised Statutes in regard to laying out highways. In 1880 the charter was

Ohio, 383. Where an act approved March 31st, 1866, required a road to be laid on or before March 1st, 1866, it was held to be directory as to time. *People ex rel. etc. v. Board of Supervisors*, 33 Cal. 487.

<sup>81</sup> *Downs v. Town of Huntington*, 35 Conn. 588; *County of Menard v. Kincaid*, 71 Ill. 587. Under the English Acts, where a company has given an owner notice that it will require his lands, it may go on and complete the purchase after the expiration of its compulsory powers. *Salisbury v. Great Northern R. R. Co.*, 17 Q. B. 840, 21 L. J. Q. B. 185, 16 Jur. 740; and see *Birmingham R. R. Co. v. Queen*, 15 Q. B. 647, 20 L. J. Q. B. 304; *Ystalyfera Iron Co. v. Neath R. R. Co.*, 17 L. R. Eq. 142, 43 L. J. Ch. 476, 29 L. T. N. S. 662; *Rangely v. Midland R. R. Co.*, 37 L. J. Ch. 313, 3 L. R. Ch. 306.

<sup>82</sup> *Treacy v. Elizabethtown etc.*

*R. R. Co.*, 85 Ky. 270, 3 S. W. Rep. 168; *S. C. 80 Ky. 266*; *Fenelon's Petition*, 7 Pa. St. 173; *Uwchlan Township Road*, 30 Pa. St. 156; *Hickory Tree Road*, 43 Pa. St. 139; *Bohlman v. Green Bay & Minnesota Ry. Co.*, 40 Wis. 157; *Emerson v. Western Union R. R. Co.*, 75 Ill. 176; *Hyslop v. Finch*, 99 Ill. 171. In New Hampshire it is held that pending proceedings are not affected by a statute relating to procedure only. *Colony v. Dublin*, 32 N. H. 432; *Boston & Maine R. R. Co. v. Cilley*, 44 N. H. 578; *Wentworth v. Farmington*, 48 N. H. 207; *Matter of New York*, 34 N. Y. App. Div. 468. An act may be passed and expressly made applicable to pending proceedings. *Bridgeport v. Hubbell*, 5 Conn. 237; *City and County of San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. Rep. 720.

<sup>83</sup> *Campau v. Detroit*, 14 Mich.

revised and the same provision re-enacted; it was held to mean the Revised Statutes as they were in 1859, and not as they had been amended by an act of 1875.<sup>84</sup> An act of 1835 provided a mode of assessing damages. An act of 1838 provided a different mode. An act of 1842 abolishing the board created by the act of 1838 was held equivalent to a repeal of a repealing act, and the act of 1835 was held to be restored.<sup>85</sup> A repeal of an act under which damages have been assessed, after the right thereto has vested, does not affect the rights of the parties.<sup>86</sup> Generally the procedure should be according to the law in force at the time.<sup>87</sup> The condemnor may have an option of two statutes,<sup>88</sup> but in such case the proceedings should be wholly under one.<sup>89</sup>

§ 248. **General and special laws: Repeal by implication.**—As a rule, a general law does not repeal a prior special law merely because it embraces the same subject matter. An intent to repeal the special law must be manifested either by express words, or by language extending the operation of the general law to all cases embraced by it, or there must be some inconsistency or absurdity in the two standing together. Accordingly a general law in regard to the assessment of damages in condemnation proceedings will not supersede the provisions of special charters on the subject,<sup>90</sup> unless expressly made applicable to all cases for condemnation,<sup>91</sup> or plainly intended as a revision of all prior laws, general and special, upon the sub-

276; *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605.

<sup>84</sup> *Matter of Altering etc. Main Street*, 98 N. Y. 454; affirming S. C. 30 Hun 424.

<sup>85</sup> *Directors of Poor v. Railroad Co.*, 7 W. & S. 236.

<sup>86</sup> *People v. Supervisors of Westchester*, 4 Barb. 64; *People v. Common Council of Buffalo*, 140 N. Y. 300, 35 N. E. Rep. 485; *People v. Common Council*, 2 Misc. 7, 21 N. Y. Supp. 601.

<sup>87</sup> *McCrea v. Champlain*, 35 App. Div. N. Y. 89.

<sup>88</sup> *Los Angeles v. Leaves*, 119 Cal. 164.

<sup>89</sup> *Verona v. Railroad Co.*, 187 Pa. St. 358.

<sup>90</sup> *Hudson River R. R. Co. v. Outwater*, 3 Sands. 689; *State v. Clarke*, 25 N. J. L. 54; *State v. Trenton*, 36 N. J. L. 198; *North Missouri R. R. Co. v. Gott*, 25 Mo. 540; *Norfolk & Southern R. R. Co. v. Ely*, 95 N. C. 77.

<sup>91</sup> *McCrea v. Port Royal R. R. Co.*, 3 S. C. 381; *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. Rep. 197; *Marlor v. Philadelphia etc.*

ject.<sup>92</sup> There may be two complete acts in reference to the same subject matter, such as the construction of gravel roads, though having inconsistent provisions, under either of which proceedings may be had, if the legislature expressly declare in the second that it was not their intention to repeal any former act on the subject.<sup>93</sup>

§ 249. **Effect of a change in the form of municipal government.**—Municipalities frequently put off one form of government for another, whereby radical changes are made in the form of government. Towns and villages become cities. One law of incorporation is exchanged for another. The laws

R. R. Co., 166 Pa. St. 524, 31 Atl. Rep. 255.

<sup>92</sup> Moore v. Superior & St. Croix R. R. Co., 34 Wis. 173; Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; Treacy v. Elizabethtown etc. R. R. Co., 85 Ky. 270, 3 S. W. Rep. 168; S. C. 80 Ky. 266; State v. Jersey City, 54 N. J. L. 49, 22 Atl. Rep. 1052. In the following cases it was held that a railroad corporation whose charter provided a complete mode of assessing damages might proceed, either under its charter, or under the general law upon the subject: McMahon v. Cincinnati & Chicago Short Line R. R. Co., 5 Ind. 413; Cascades R. R. Co. v. Sohns, 1 Wash. Ter. N. S. 558.

<sup>93</sup> Robinson v. Rippley, 111 Ind. 112; In re City of Cedar Rapids, 85 Ia. 39, 51 N. W. Rep. 1142; Howes v. Belfast, 72 Me. 46; Driscoll v. City of Taunton, 160 Mass. 486, 36 N. E. Rep. 495; Trowbridge v. City of Detroit, 99 Mich. 443, 58 N. W. Rep. 368; Shroder v. City of Lancaster, 170 Pa. St. 136, 32 Atl. Rep. 587; Seaman v. Borough of Washington, 172 Pa. St. 467, 33 Atl. Rep. 756.

The following cases involved the question as to which of two or more statutes should apply, but seem too local and particular to warrant more than a reference: City and County of San Francisco v. Kiernan, 98 Cal. 611, 33 Pac. Rep. 720; Crow v. Judy, 139 Ind. 562, 38 N. E. Rep. 415; Arnold v. Council Bluffs, 85 Iowa, 441, 52 N. W. Rep. 347; Knight v. Aroostook Riv. R. R. Co., 67 Me. 291; Kearney Tp. v. Ballantine, 54 N. J. L. 194, 23 Atl. Rep. 821; State v. West Hoboken, 54 N. J. L. 508, 24 Atl. Rep. 477; New York etc. R. R. Co. v. Welsh, 143 N. Y. 411, 38 N. E. Rep. 378; City of Syracuse v. Stacey, 86 Hun 441, 33 N. Y. Supp. 929; Durham & N. R. R. Co. v. Richmond & D. R. R. Co., 106 N. C. 16, 19 S. E. Rep. 1041; Gwinner v. Lehigh R. R. Co., 55 Pa. St. 126; Appeal of Borough of Hanover, 150 Pa. St. 202, 24 Atl. Rep. 669; Chestnut St., 8 Pa. Co. Ct. 55; Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. Rep. 486; Appeal of Huntington etc. R. R. Co., 149 Pa. St. 133, 24 Atl. Rep. 189; In re Public Alley, 160 Pa. St. 89, 28 Atl. Rep.

under which such changes are made frequently do, and always ought, to make provisions for all pending suits and proceedings and all accrued rights and liabilities in such a way as to prevent confusion or loss. But sometimes this is not done, and the question arises, what would be the effect of such a change upon pending proceedings for condemnation? It would be difficult to lay down any general rule for such cases, but the following decisions may be noticed: County Commissioners acquired jurisdiction to lay out a town way in the town of Lawrence, in July, 1852. The way was finally located and established April 12, 1853. On March 29, 1853, the town became a city, by accepting a charter granted by the legislature. By this charter jurisdiction of the subject matter was taken away from the county commissioners as to the incorporated territory. The charter continued the town officers until the organization of the city government, which did not take place till April 18, 1853. The lay-out was held valid.<sup>94</sup> In another case the Scheme and Charter for the city and county of St. Louis was adopted on August 22, 1876, and by its terms was to be operative in sixty days thereafter. A controversy arose over its adoption, which was not determined until March 5, 1877, and until then it was unknown whether it was adopted or not. On November 26, 1876, proceedings were begun for opening a street, pursuant to ordinances passed in January and July, 1876. These proceedings were finally completed, by the confirmation of the commissioner's report, on March 26, 1877. The proceedings were begun and carried on according to the old charter. The new charter provided that all ordinances for the opening of any street upon which proceedings should not be begun when the charter went into operation should stand repealed. In theory the new charter was in operation from and after October 22, 1876. But the proceedings were sustained on what was called the *de facto* principle.<sup>95</sup> A statute of California provided that

506; *In re Sewer St.*, 20 Phil. 367; *West Whiteland Road*, 4 Pa. Co. Ct. 511; *Sewickley Borough v. Jennings*, 12 Pa. Co. Ct. 75.

<sup>94</sup> *Durant v. Lawrence*, 1 Allen, 125.

<sup>95</sup> *St. Louis v. Stoddard*, 15 Mo. App. 173.

the board of water commissioners of a township should establish a ditch upon receiving a petition from a majority of the persons in a township liable to work on water ditches. Such petition was presented to the commissioners of San José township, and, pending proceedings under it, Azusa township was set off from San José. The commissioners of Azusa township, in which the proposed ditch would be, filed a supplemental petition and continued the proceedings. This was held to be erroneous, and it was further held that new proceedings would have to be begun, based upon a petition by the required number of persons residing in the new township.<sup>96</sup>

§ 250. **Conflict of jurisdiction between different authorities having power in the same territory.**—Where a city or borough is vested with power to lay out and improve streets, the authorities of a town or county embracing such city or borough are precluded from exercising the same power within the same territory.<sup>1</sup> Of course it is otherwise if the city or borough has no authority in the premises.<sup>2</sup> So it is held that under a general drainage act a ditch cannot be established wholly within a city which has full power to make sewers and drains for any purpose for which they are needed.<sup>3</sup> This seems the reasonable rule. To hold other-

<sup>96</sup> *Dalton v. Water Commissioners*, 49 Cal. 222; see also, on the same subject, *Minhinnah v. Haines*, 29 N. J. L. 388; *Road in Sterrett Tp.*, 123 Pa. St. 231, 16 Atl. Rep. 777; *Shaaber v. City of Reading*, 133 Pa. St. 643, 19 Atl. Rep. 419.

<sup>1</sup> *State v. Clarke*, 25 N. J. L. 54; *State v. Trenton*, 36 N. J. L. 198; *South Chester Road*, 80 Pa. St. 370; *Cowan's Case*, 1 Overton, 310; *Gallagher v. Head*, 72 Ia. 173; *Shields v. Highway Comrs.*, 158 Ill. 214, 41 N. E. Rep. 985; *Cherry v. Board of Comrs.*, 52 N. J. L. 544, 20 Atl. Rep. 970, affirming *S. C. 51 N. J. L. 417*, 18 Atl. Rep.

299; *In re Piscataway & B. Tps.*, 54 N. J. L. 539, 24 Atl. Rep. 753; *Easton Road Case*, 3 Rawle, 195; *Somerset etc. Road*, 74 Pa. St. 61; *Street in Donnington*, 3 Pa. Co. Ct. 455; *Road in Huntington*, 11 Pa. Co. Ct. 119; *Norwood v. Gonzales County*, 79 Tex. 218, 14 S. W. Rep. 1057. And see *In re Twenty-eighth St.*, 15 Phil. 350.

<sup>2</sup> *Washington v. Fisher*, 43 N. J. L. 377; *State v. Troth*, 34 N. J. L. 377; *Road in Mercer*, 14 S. & R. 447; *Matter of Callowhill St.*, 32 Pa. St. 361.

<sup>3</sup> *Anderson v. Endicutt*, 101 Ind. 539.

wise might bring about very disagreeable and disastrous conflicts of jurisdiction and authority. Some courts have held, however, that in such cases the jurisdiction is concurrent.<sup>4</sup> In many cases town or county authorities have authority to lay out town or county roads, while the city or village authorities have exclusive jurisdiction of purely local streets.<sup>5</sup> The authorities of the larger jurisdiction may lay out a way wholly within the smaller when it is of the character over which they have jurisdiction.<sup>6</sup> In Massachusetts it is held that the selectmen of a town may lay out a highway wholly within their town, but extending to the town limits and there connecting with other roads so as to form a continuous inter-town thoroughfare, though the county commissioners alone have jurisdiction to estab-

<sup>4</sup> *Norwich v. Story*, 25 Conn. 44; *Bennington v. Smith*, 29 Vt. 254; *Windham v. Cumberland County Commissioners*, 26 Me. 406. In such case the authorities first instituting proceedings will be entitled to proceed. *Monroe v. Danbury*, 24 Conn. 199; *Powers v. City Council of Springfield*, 116 Mass. 84. Special cases: The charter of Newark, approved March 11, 1857, gave to the city council the power to lay out and open streets. By act of March 20, 1857, exclusive power over the subject was conferred upon commissioners to be appointed by the council; held a repeal of the former act as to the power in question. *State v. Newark*, 28 N. J. L. 491. The city of New Orleans was divided into municipalities; held that one municipality could not open a street, the center line of which was the dividing line between it and another municipality, under a statute formerly applicable to the whole city. *Municipality No. 1*

*v. Young*, 5 La. An. 362. And see *People v. Lake County*, 33 Cal. 487; *Sparling v. Dwenger*, 60 Ind. 72.

<sup>5</sup> *State v. County Comrs.* 23 Fla. 632; *Harkness v. Waldo County Comrs.* 26 Me. 353; *Herman v. County Comrs.*, 39 Me. 583; *City of Deering v. County Comrs.*, 87 Me. 151, 32 Atl. Rep. 797; *Cragie v. Mellen*, 6 Mass. 7; *Monterey v. County Comrs.*, 7 Cush. 394; *People v. Highway Comr.*, 15 Mich. 347; *Wells v. McLaughlin*, 17 Ohio, 97; *Palo Alto Road View*, 13 Pa. Co. Ct. 537; *Kelly v. Danby*, 46 Vt. 504.

<sup>6</sup> In the following cases it was held that county commissioners could, under a proper petition, lay out a way wholly within a town or village: *Harkness v. Waldo County Comrs.*, 26 Me. 353; *Herman v. County Comrs.*, 39 Me. 583; *Wells v. McLaughlin*, 17 Ohio, 97; *Kelley v. Danby*, 46 Vt. 504. Under a petition for a way in two towns, a way cannot be laid out wholly in one of



lish inter-town ways.<sup>7</sup> But the contrary is held in New Hampshire.<sup>8</sup>

§ 251. **Statutes have no extra-territorial effect.**—It is a general rule that statutes have no extra-territorial effect. It follows that one State cannot authorize the condemnation of property in another State;<sup>9</sup> also, that it cannot authorize works which will produce actionable damages in another State,<sup>10</sup> or in territory within a State, jurisdiction over which has been ceded to the United States.<sup>11</sup> Where a mill erected in Massachusetts flowed lands in New Hampshire, it was held that damages could not be assessed in New Hampshire under the statutes of the latter State in relation to mills.<sup>12</sup> And, generally, the mill acts of one State do not apply to mills erected out of the State, though flowing lands in the former State.<sup>13</sup> But where a mill or other works in one State produce damage in another State, a common law action can be maintained in the State where the works are situated.<sup>14</sup>

The city of Worcester, Massachusetts, took the waters of Tatnuck Brook for public use, as a water supply for said city. The brook was a tributary of the Blackstone River, and the diversion of the waters of the brook diminished the supply of water coming to mills on the Blackstone River situated in Rhode Island. In *Manville Company v. Worcester*,<sup>15</sup> the plaintiff, having a mill in the latter State, was allowed to maintain an action of tort in Massachusetts for

the towns: *Hopkinton v. Winship*, 35 N. H. 209; *Petition of Newport*, 39 N. H. 67.

<sup>7</sup> *Monterey v. County Comrs.*, 7 Cush. 394.

<sup>8</sup> *Griffin's Petition*, 27 N. H. 343. And see *Biddeford v. County Comrs.*, 78 Me. 105.

<sup>9</sup> *Saunders v. Bluefield W. W. & Imp. Co.*, 58 Fed. Rep. 173; *Crosby v. Hanover*, 36 N. H. 404. This last case was an attempt to condemn a bridge across the Connecticut River, one end of which was in Vermont.

<sup>10</sup> *Farnum v. Blackstone Canal Co.*, 1 Sumner, 46; *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131.

<sup>11</sup> *United States v. Ames*, 1 W. & M. 76.

<sup>12</sup> *Salisbury Mills v. Forsaith*, 57 N. H. 124. To the same effect, *Wooster v. Great Falls Manf. Co.*, 39 Me. 246.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Wooster v. Great Falls Manf. Co.*, 39 Me. 246; *Mannville Co. v. Worcester*, 138-Mass. 89.

<sup>15</sup> 138 Mass. 89.

damages caused by the diversion. In *Banigan v. Worcester*<sup>16</sup> it appeared that several suits were begun in the Superior Court of Worcester county, Massachusetts, under the statutes of the latter State, by the owners of mill property situated on the Blackstone River in Rhode Island, for a statutory assessment of damages by reason of the diversion of Tatnuck Brook. These cases were removed to the Federal court, and it was held by Carpenter, J., that the suits were removable, and that the petitions were well brought under the statute.<sup>17</sup>

§ 252. When a naked authority to condemn may be exercised according to previous statutes, and when not.—The provision of the constitution that compensation must be made for property taken for public use is absolute and imperative. When the legislature authorizes the taking of private property it must make provision for ascertaining and paying compensation. But such provision need not be made in each particular act conferring authority. Where authority to condemn is conferred by an act which is silent as to compensation, it sometimes becomes a nice question whether the provisions of prior statutes can be invoked to help it out. Where an additional authority to condemn property is conferred upon a company it may be exercised according to the provisions of prior statutes applicable to the company.<sup>18</sup> Where power to lay out streets and alleys is conferred by special act upon a particular borough, or is contained in a special charter, the municipality may proceed according to the provisions of the general law in regard to highways.<sup>19</sup> The same is true also where the legis-

<sup>16</sup> 30 Fed. Rep. 392.

<sup>17</sup> This view is also supported by *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, where it was held that one who owned lands situated partly in Massachusetts and partly in New Hampshire, which were injured by the diversion of a stream in Massachusetts to supply a vil-

lage, must seek his remedy under the statute for his lands in both States, and that an action of tort would not lie.

<sup>18</sup> *Railroad Co. v. State*, 9 Bax. 522; *Heady v. Vevay etc. Turnpike Co.*, 52 Ind. 117.

<sup>19</sup> *Barnes v. Springfield*, 4 Allen, 488; *Sharet's Road*, 8 Pa. St. 89.

lature direct or authorize the proper authorities to lay out a particular street or highway.<sup>20</sup> In a case which arose in Virginia it appeared that the government of county affairs was vested in the county court which was authorized to condemn property when necessary for the uses of the county. By a subsequent statute the management of the county affairs was vested in a board of supervisors, whose duty it was, among other things, to provide suitable buildings for the use of the county. It was held that the authority to condemn property for county buildings was necessarily implied, and that compensation could be assessed according to the prior statute, which in terms applied only to the county court.<sup>21</sup> A corporation was created by special charter, with power to buy, maintain or manage any works, public or private, which may tend, or be designed, to improve, increase, facilitate or develop, trade, travel, transportation of freight, live stock, passengers or any other traffic by land or water in the United States. It was authorized "to enter upon and occupy the lands of individuals or companies, on making payment therefor or giving security according to law." No mode of procedure was pointed out, and it would appear that there was no general eminent domain statute. It was held that the company could proceed to condemn under the law applicable to the particular kind of works it proposed to construct; that is, it could use the railroad law, if it proposed to construct a railroad, the natural gas law, if it proposed to transport natural gas, and so on.<sup>22</sup>

§ 253. The authority must be strictly pursued.—This is a proposition so universally conceded and so often reiterated by the courts that it requires no discussion, and we shall simply refer to some of the principal cases illustrating the doctrine.<sup>23</sup> "As private property can be taken for pub-

<sup>20</sup> Smedley v. Erwin, 51 Pa. St. 445; City of Belfast Appellants, 53 Me. 431; Warner v. Hennepin County, 9 Minn. 139; Hamlin v. New Bedford, 143 Mass. 192.

<sup>21</sup> Supervisors of Culpeper v.

Gorrell, 20 Gratt. 484. Compare § 240 and cases there cited.

<sup>22</sup> Carothers v. Philadelphia Co., 118 Pa. St. 468, 12 Atl. Rep. 314.

<sup>23</sup> Roberts v. Williams, 15 Ark.

lic uses, against the consent of the owner only in such cases, and by such proceedings, as may be specially provided by

43; *Miller v. Brown*, 56 N. Y. 383; *Matter of Schreiber*, 53 How. Pr. 359; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Curran v. Shattuck*, 24 Cal. 427; *Lincoln v. Colusa*, 28 Cal. 662; *Damrell v. Board of Supervisors etc.*, 40 Cal. 154; *Young v. McKenzie*, 3 Ga. 31; *Justices etc. v. Plank Road Co.*, 9 Ga. 475; *Hyslop v. Finch*, 99 Ill. 171; *Chicago & Alton R. R. Co. v. Smith*, 78 Ill. 96; *New Orleans v. Sohr*, 16 La. An. 393; *Mayor etc. of Jefferson v. Delachaise*, 22 La. An. 26; *State v. Van Gelson*, 15 N. J. L. 339; *Griscom v. Gilmore*, same, p. 475; *State v. Jersey City*, 25 N. J. L. 309; *State v. Town of Bergen*, 33 N. J. L. 72; *Harris v. Inhabitants of Marblehead*, 10 Gray, 40; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Kroop v. Forman*, 31 Mich. 144; *Toledo, Ann Arbor & Northern Mich. R. R. Co. v. Munson*, 57 Mich. 42; *Stockett v. Nicholson*, *Walker (Miss.)* 75; *Bohlman v. Green*, *Eay & Minn. Ry. Co.*, 40 Wis. 157; *Detroit Sharpshooters' Association v. Highway Commissioners*, 34 Mich. 36; *St. Louis v. Franks*, 78 Mo. 41; *Harbeck v. Toledo*, 11 Ohio St. 219; *Killbuck Private Road*, 77 Pa. St. 39; *Gulf, H. & S. A. R. R. Co. v. Mud Creek, I. A. & M. Co.*, 1 Tex. App. Civil Cas. p. 169; *Adams v. Clarksburg*, 23 W. Va. 203; *Mobile etc. R. R. Co. v. Ala. Mid. R. R. Co.*, 87 Ala. 501, 6 So. Rep. 404; *Reid v. Ohio Miss. R. R. Co.*, 126 Ill. 48, 17 N. E. Rep. 807; *Finko v. Zeigelmliller*, 77 Ia.

253, 42 N. W. Rep. 183; *Calder v. Police Jury*, 44 La. An. 173, 10 So. Rep. 726; *Pingree v. Co. Comrs.*, 30 Me. 351; *Hubbard v. Great Falls Mfg. Co.*, 80 Me. 39, 12 Atl. Rep. 878; *Derby v. Framingham etc. R. R. Co.*, 119 Mass. 516; *Chicago etc. R. R. Co. v. Young*, 96 Mo. 39, 8 S. W. Rep. 776; *Orrick School Dist. v. Dorton*, 125 Mo. 439, 28 S. W. Rep. 765; *State v. Tarrelly*, 36 Mo. App. 282; *Taylor v. Todd*, 48 Mo. App. 550; *Spurgeon v. Bartlett*, 56 Mo. App. 349; *Rousey v. Wood*, 57 Mo. App. 650; *State v. Jersey City*, 54 N. J. L. 49, 22 Atl. Rep. 1052; *Newell v. Wheeler*, 48 N. Y. 486; *Woodruff v. Douglas Co.*, 17 Or. 314, 21 Pac. Rep. 49; *Appeal of Borough of Curwensville*, 129 Pa. St. 74; *Harbaugh's Road*, 8 Pa. Co. Ct. 671; *Gulf etc. R. R. Co. v. Poindexter*, 70 Tex. 98, 7 S. W. Rep. 316; *Galveston Wharf Co. v. Gulf etc. R. R. Co.*, 72 Tex. 454, 10 S. W. Rep. 537; *Town of Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. Rep. 547; *Lewis v. St. Paul etc. R. R. Co.*, 5 S. D. 148, 58 N. W. Rep. 580; *Fork Ridge Baptist Cem. Ass. v. Redd*, 33 W. Va. 202, 10 S. E. Rep. 405; *Charleston & S. S. Bridge Co. v. Comstock*, 36 W. Va. 263; 15 S. E. Rep. 69; *Herron v. Improvement Comrs., L.R. (1892) A. C. 498*; *Bell v. Ohio etc. R. R. Co.*, 1 Grant, 105; *Glass v. Basin Min. etc. Co.*, 22 Mon. 151, 55 Pac. Rep. 1047; *Schneider v. Rochester*, 160 N. Y. 165; reversing 33 App. Div. 458; *Keefer v. Bridgeport*, 68 Conn. 401, 36 Atl. Rep. 801; *State*

law, and as these proceedings are not according to the common law, and are in derogation of private right, and as they wholly depend on statute regulation in this State, any one using this extraordinary and harsh power must comply with all the provisions of the statute."<sup>24</sup> A strict compliance with the statute does not necessarily mean a literal and exact compliance. A substantial compliance will suffice.<sup>25</sup> As to what is a substantial compliance will be considered in future chapters relating to procedure and the validity of the proceedings when collaterally attached. Courts cannot dispense with the forms and conditions prescribed by law, on the notion that they are not essential. The very fact that they are prescribed makes them matters of substance.<sup>26</sup> When the matter is in doubt the general rule applies in favor of the property owner and against the party attempting to enforce the statute.

§ 254. The authority to condemn will be strictly construed. —All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.<sup>27</sup>

v. Hensley, 59 N. J. L. 149; State v. Larabee, 59 N. J. L. 259. "The form by which private property may be taken for public purposes having been prescribed, it must be strictly pursued, or the attempt will be ineffectual and the proceedings void, and all persons acting under the color of them will be trespassers." *Stewart v. Wallis*, 30 Barb. 344.

<sup>24</sup> *Fork Ridge Baptist Cem. Ass. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405.

<sup>25</sup> *Charleston etc. S. S. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. Rep. 69; *Nickerson v. Lynch*, 135 Mo. 471, 37 S. W. Rep. 128; *Jones v. Zink*, 65 Mo. App. 409.

<sup>26</sup> "Every condition prescribed

in the grant must be complied with, and the proceedings must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential." *State v. Jersey City*, 54 N. J. L. 49, 22 Atl. Rep. 1052.

<sup>27</sup> *Gray v. Liverpool & Bury Ry. Co.*, 9 Beav. 391; *Martin v. Rushton*, 42 Ala. 289; *Spofford v. B. & B. R. R. Co.*, 66 Me. 26; *Binney's Case*, 2 Bland. Ch. (Md.) 99; *Lea v. Johnson*, 9 Iredell Law, 15; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Watson v. The Acquacknonck Water Co.*,

"An act of this sort," says Bland, J., "deserves no favor; to construe it liberally would be sinning against the rights of property."<sup>28</sup> But, as in other cases, such a construction

36 N. J. L. 195; Reynolds v. Spears, 1 Stew. 34; Alabama Great Southern R. R. Co. v. Gilbert, 71 Ga. 591; Chicago & Eastern Illinois R. R. Co. v. Wiltse, 116 Ill. 449; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121; Cox v. Tifton, 18 Mo. App. 450; Jersey City v. Central R. R. Co., 40 N. J. Eq. 417; Central R. R. Co. v. Hudson Terminal Co., 46 N. J. L. 289; Miami Coal Co. v. Wigton, 19 Ohio St. 560; Pittsburgh & Lake Erie R. R. Co. v. Brace, 102 Pa. St. 23; Simpson v. South Staffordshire Water Works Co., 34 L. J. Eq. 380; Mobile etc. R. Co. v. Ala. Mid. R. R. Co., 87 Ala. 501; Eward v. Lawrenceburgh etc. R. R. Co., 7 Ind. 711; City of Detroit v. Wabash etc. R. R. Co., 63 Mich. 712, 30 N. W. Rep. 321; Beck v. United N. J. R. R. Co., 39 N. J. L. 45; Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. Rep. 601; Matter of Union El. R. R. Co., 113 N. Y. 275, 21 N. E. Rep. 81; City of Cincinnati, v. Sherike, 47 Ohio St. 217, 25 N. E. Rep. 169; Packer v. Sunbury etc. R. R. Co., 19 Pa. St. 211; O'Neal v. City of Sherman, 77 Tex. 182, 14 S. W. Rep. 31; Mills v. St. Clair County, 8 How. 569; City of Madison v. Daley, 58 Fed. Rep. 751; West v. Parkdale, 8 Ontario, 59; Lamb v. North London R. R. Co., 4 L. R. Ch. 522, 21 L. T. N. S. 98; Hopkins v. Fla. Cent. etc. R. R. Co., 97 Ga. 107, 25 S. E. Rep. 452; Harvey v. Aurora etc. R. R. Co., 174 Ill.

295; Breaux v. Bienvenu, 51 La. An. 687, 25 So. Rep. 321; Charlottesville v. Maury, 96 Va. 383, 31 S. E. Rep. 520.

"In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legislature to private corporations. The motive of the promoters of such corporations is usually private gain, although their creation may subserve a public purpose. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law." Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 490, 491.

<sup>28</sup> Binney's Case, 2 Bland. Ch. 99.

will, if possible, be given to an act as will carry into effect the chief and manifest purpose for which it was passed,<sup>29</sup> and such as will give effect to all its words.<sup>30</sup> It will be so construed as to support its validity rather than otherwise.<sup>31</sup>

§ 254a. Provisions as to compensation and remedy and in favor of the property owner should be liberally construed. —This is a familiar rule, but a few cases in which it is enunciated are referred to.<sup>32</sup>

§ 255. Construction of statutes as to location.—In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied. But when the power has undoubtedly been conferred by a statute, then, in so far as it attempts to define the location or route, it is to receive a reasonable rather than a strict construction. It is against common right that a person or corporation should have the power, but, having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it.<sup>33</sup> Power to construct a railroad "to the place of shipping lumber" on a tide-water river authorizes an extension of the tracks over flats and tide-water to a point where lumber may be conveniently shipped.<sup>34</sup> Authority to build a railroad terminating at some suitable point on another railroad "between Metser's ford and Wager's ford on the river Schuylkill," was held

<sup>29</sup> The Bellona Company Case, 3 Bland. Ch. 442; Nunnemaker v. Columbia W. R. R. Co., 47 S. C. 485; Canandaigua v. Benedict, 24 App. Div. N. Y. 348.

<sup>30</sup> Beck v. United N. J. R. R. Co., 39 N. J. L. 45.

<sup>31</sup> Pittsburgh v. Scott, 1 Pa. St. 309; Town of Keyport v. Cherry, 51 N. J. L. 417, 18 Atl. Rep. 299; In re Barre Water Co., 62 Vt. 27, 20 Atl. Rep. 109, 3 Am. R. R. & Corp. Rep. 136; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. &

Corp. Rep. 258; Commissioners' Court v. Street, 116 Ala. 28, 22 So. Rep. 629; St. Joseph v. Zimmerman, 142 Mo. 155; Browning v. Collis, 21 N. Y. Misc. 155.

<sup>32</sup> Dyer v. Belfast, 88 Me. 140, 33 Atl. Rep. 790; Nashville v. Nichol, 3 Bax. 338; Schuylkill Nav. Co. v. Loose, 19 Pa. St. 15; West v. Parkdale, 8 Ont. 59.

<sup>33</sup> Pierce on Railroads, p. 258; Chesapeake & Ohio Canal Co. v. Key, 3 Cranch, C. C. 599.

<sup>34</sup> Peavey v. Calais R. R. Co., 30 Me. 498.

not to authorize a connection with the Schuylkill canal and the maintenance of a canal basin as an appurtenance.<sup>35</sup> Where the route of a railroad was described in a statute in part as running through the towns A, B, C, D, etc., it was held that the order named was not imperative.<sup>36</sup> Where an avenue was directed to be laid out in a direct line between two points and the act also provided that it should not be laid through any buildings, yards or orchards, without the consent of the owner, it was held that deviations might be made to avoid buildings.<sup>37</sup> Authority to lay out a highway on a line between two towns does not authorize a highway wholly within one town, but bounded on one side by the division line.<sup>38</sup> On the other hand, the fact that the statute provides that, in case of a road on the line between two towns, the proceedings shall be before the commissioners of both towns, does not prevent the commissioners of one town, having jurisdiction to lay out roads in their own town, from laying out a road along the division line, but wholly in their town.<sup>39</sup> Under authority to lay out a road upon and along the division line between two counties, it was held that the center of the road must coincide with the division line and that where a creek formed the line a lay-out was impossible.<sup>40</sup> Under authority to lay out highways from "town to town and from place to place," a highway may be laid out wholly within a town.<sup>41</sup> A railroad had power to appropriate contiguous lands, not exceeding five acres,

<sup>35</sup> *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337.

<sup>36</sup> *Commonwealth v. Fitchburg R. R. Co.*, 8 Cush. 240.

<sup>37</sup> *Charles Street Avenue Co. v. Merryman*, 10 Md. 536. The following cases illustrate the same principle: *State v. Wilton R. R. Co.*, 19 N. H. 521; *Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co.*, 5 Allen, 221; *Heath v. Des Moines & St. Louis Ry. Co.*, 61 Ia. 11; *Clark v. Blackmar*, 47 N. Y. 150. Under a gen-

eral railroad law a road may be built which is wholly within one city. *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755.

<sup>38</sup> *Matter of the Town of Bridport*, 24 Vt. 176.

<sup>39</sup> *Mack v. Commissioners of Highways*, 41 Ill. 378.

<sup>40</sup> *Roaring Creek Road*, 11 Pa. St. 356.

<sup>41</sup> *New Vineyard v. Somerset*, 15 Me. 21.



for warehouse purposes. It was held it could only take lands immediately adjoining its right of way.<sup>42</sup> A statute provided that land might be taken for a cemetery, when "land necessary therefor cannot be obtained in any suitable place at a reasonable price by contract with the owner." It was held that by "any suitable place" the legislature meant nothing less than the most suitable place, or a place as suitable as any other, or as suitable as the town could afford to pay for.<sup>43</sup> A company was authorized to condemn lands "adjoining their road as constructed on their right of way as located." It was held not to authorize the taking of lands adjoining a side or spur track.<sup>44</sup> A company was authorized to occupy a certain street and to take ground near or convenient to said street for depot purposes. It purchased grounds so that it had to cross another street in order to reach them. It was held it had no power to cross such street, but should have selected lands adjacent to the street occupied.<sup>45</sup> Authority to build an elevated railroad on a street, does not authorize any part of a depot or stairs on a cross street.<sup>46</sup> The location of a railroad partly in another State will not, for that reason, be held invalid by the courts of the State to which the corporation belongs.<sup>47</sup> An act provided that a railroad might be constructed "to some suitable point in Orange street, or some street north of said street, or south of Market street, in the city of Newark;" held that the act related, not to the route, but to the termination of the road, and that the company was not precluded from locating upon or along Market street.<sup>48</sup> A statute required that where a new railroad was to be built between two points where "a railroad is now constructed," it should be located ten miles at least from

<sup>42</sup> *Bird v. W. & M. R. R. Co.*, 8 Rich. Eq. S. C. 46.

<sup>43</sup> *Crowell v. Londonderry*, 63 N. H. 42.

<sup>44</sup> *Akers v. United New Jersey R. R. Co.*, 43 N. J. L. 110.

<sup>45</sup> *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150.

<sup>46</sup> *Mattlage v. New York El. R. R. Co.*, 67 How. Pr. 232, 14 Daly 1.

<sup>47</sup> *Piedmont & Cumberland Ry. Co. v. Speelman*, 67 Md. 260; and see *Matter of New York L. & W. R. R. Co.*, 88 N. Y. 279.

<sup>48</sup> *McFarland v. Orange etc. R. R. Co.*, 13 N. J. Eq. 17.

the old road, was held not to prevent a new road within less than ten miles of a road in process of construction.<sup>49</sup> A railroad company was empowered to manufacture iron and steel from ore obtained on its own lands; held it could not locate its road and station over an iron mine for the purpose of obtaining the mine, and not in good faith for the purposes of its road.<sup>50</sup> As a general rule statutes conferring the power of eminent domain upon corporations and individuals vest a large discretion in the grantees as to the location of their lines and works, and the courts cannot interfere with the exercise of this discretion unless there is bad faith or an excess of authority.<sup>51</sup>

§ 256. Construction of statutes as to the purpose for which the power may be exercised: Railroads. —A railroad company had a general power to condemn property for the purposes of its incorporation. It was licensed by the city of Buffalo to lay its track along a street and across a canal slip, provided it built and maintained a swing-bridge over the slip. It was held that it could condemn land in order to obtain room in which to swing the bridge.<sup>52</sup> So if it becomes the duty of a railroad company to carry a highway over or under its road, it may condemn the land necessary therefor.<sup>53</sup> Under authority to construct a "railway and works," land may be taken for a station.<sup>54</sup> So land may be taken for a depot under a general authority to condemn land necessary for the construction of the road.<sup>55</sup> A statute

<sup>49</sup> *Macon & A. R. R. Co. v. Macon & D. R. R. Co.*, 86 Ga. 83, 13 S. E. Rep. 157.

<sup>50</sup> *Jenkins v. Central Ontario R. R. Co.*, 4 Ont. 593.

<sup>51</sup> *Douglass v. Byrnes*, 59 Fed. Rep. 29; *Colorado Eastern R. R. Co. v. Union Pac. R. R. Co.*, 41 Fed. Rep. 293; *Sample v. Carroll*, 132 Ind. 496, 32 N. E. Rep. 220; *Bass v. City of Ft. Wayne*, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173; *London etc. R. R. Co. v. Truman*,

*L. R.* 11 H. L. 45. Compare *Morton v. Mayor etc. of New York*, 140 N. Y. 207, 35 N. E. Rep. 490; *Lowell v. Washington County R. R. Co.*, 90 Me. 80, 37 Atl. Rep. 869.

<sup>52</sup> *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun 148.

<sup>53</sup> *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131.

<sup>54</sup> *Cother v. Midland Ry Co.*, 2 Phillips, 469.

<sup>55</sup> *Nashville & Chattanooga R.*

provided that a company owning a completed railroad could condemn land "for necessary additional depot grounds" on getting the approval of the railroad commissioners. It was held that the right was not limited to the enlargement of existing depot grounds, but that land might be condemned for a new station.<sup>56</sup> Under authority to a company to take land necessary for its works, it can only take land to be occupied by its works, and cannot condemn land merely to get earth or materials for construction.<sup>57</sup> Power to lay a double track means on the same right of way.<sup>58</sup> A railroad company cannot condemn for widening a street upon which it is proposed to lay its track.<sup>59</sup> It has been held that a lessee company may condemn for the purpose of enlarging the right of way of its lessor.<sup>60</sup> A railroad company may not condemn for a dam across a navigable stream for the purpose of obtaining water for locomotives.<sup>61</sup> But where authority is given to condemn for water stations, the company may condemn for a dam and flowage, though the

R. Co. v. Cowardine, 11 Humph. 348; State v. Railroad Comrs., 56 Conn. 308; Ewing v. Alabama & Va. R. R. Co., 68 Miss. 551, 9 So. Rep. 295; In re Long Island R. R. Co., 143 N. Y. 67, 37 N. E. Rep. 636. In State v. Railroad Comrs., 56 Conn. 308, 313, the court says: "Depots for passengers and freight are essential parts of railroads. A railroad is incomplete without them. It is doubtless true that in speaking of the several parts of a railroad we distinguish between the main tracks, side-tracks or turnouts, and depots; but when we speak of a railroad from one place to another, we use the word in a comprehensive sense as embracing all these, and mean by it, so far as real estate is concerned, all the land and buildings owned by the cor-

poration and necessary or convenient for the transaction of its business."

<sup>56</sup> Jager v. Dey, 80 Ia. 23, 45 N. W. Rep. 391.

<sup>57</sup> Eversfield v. Mid-Sussex Ry. Co., 3 DeG. & J. 286; Bentineck v. Norfolk Estuary Co., 8 DeG. McN. & G. 714; see also Parsons v. Howe, 41 Me. 213; New York etc. R. R. Co. v. Gunnison, 1 Hun 496; S. C. 3 N. Y. Supm. Ct. Rep. 632.

<sup>58</sup> People v. New York & Harlem R. R. Co., 45 Barb. 73.

<sup>59</sup> Chicago etc. R. R. Co. v. Galt, 133 Ill. 657, 23 N. E. Rep. 425, 24 N. E. Rep. 674, 1 Am. R. R. & Corp. Rep. 365.

<sup>60</sup> Hespenhelde's Appeal, 4 Penny. 71.

<sup>61</sup> Gulf etc. R. R. Co. v. Tacquard, 3 Tex. Ct. of App. p. 179, § 142.

water will set back twelve hundred feet.<sup>62</sup> A railroad crossed a bend in a river. It had authority to take what was necessary for the construction and operation of its road. It was held it could condemn land for a new channel so as to avoid two bridges and also take the riparian rights on the old channel.<sup>63</sup> Unless otherwise provided in the act, a company may be organized under a general railroad law to construct a railroad wholly within a city, or across a river, and may condemn property therefor.<sup>64</sup>

§ 256a. **Same: Branch and lateral railroads.**—An act conferring authority upon a railroad to construct branches from its main line, means the main line as it existed at the time the act was passed.<sup>65</sup> The charter of a railroad company gave it power to construct "branches or lateral roads in any direction whatsoever in connection with the said railroad, not exceeding ten miles each in length." It was held that it could construct a branch running in the same general direction as the main line and connecting with another railroad.<sup>66</sup> It has been held no objection that the branch is twice as long as the main line.<sup>67</sup> The power to build laterals or branches implies the power to condemn for that purpose.<sup>68</sup> A railroad, authorized to construct a specified main line and branches, cannot construct the branch and abandon the main line.<sup>69</sup>

<sup>62</sup> *Smithko v. Pittsburgh etc. R. R. Co.*, 5 Pa. Dist. Ct. 543.

<sup>63</sup> *Bigelow v. Draper*, 6 N. D. 152.

<sup>64</sup> *Wiggins Ferry Co. v. East St. Louis etc. R. R. Co.*, 107 Ill. 450; *Niemeyer v. Little Rock Junction R. R. Co.*, 43 Ark. 111; *National Docks etc. R. R. Co. v. United N. J. R. R. Co.*, 53 N. J. L. 217, 21 Atl. Rep. 570.

<sup>65</sup> *City of Philadelphia v. Philadelphia etc. R. R. Co.*, 19 Phil. 507. To same effect: *People's Pass. R. R. Co. v. Market St. Pass. R. R. Co.*, 8 Pa. Co. Ct. 273.

<sup>66</sup> *Blanton v. Richmond etc. R.*

*Co.*, 86 Va. 618, 10 S. E. Rep. 925. And see *Nehall v. Galena etc. R. R. Co.*, 14 Ill. 273.

<sup>67</sup> *Volmer v. Schuylkill Riv. E. S. R. R. Co.*, 18 Phil. 248.

<sup>68</sup> *Nehall v. Galena etc. R. R. Co.*, 14 Ill. 273.

<sup>69</sup> *Goelet v. Met. Transit Co.*, 48 Hun 520, 15 N. Y. St. 936, 1 N. Y. Supp. 74. See further on the power to take for branch or lateral roads: *Graff v. Evergreen R. R. Co.*, 2 Pa. Co. Ct. 502; *Schofield v. Pennsylvania S. V. R. R. Co.*, 12 Pa. Co. Ct. 122; *Wheeling Bridge etc. Co. v. Camden Consol. Oil Co.*, 35 W.

§ 256b. **Same: Street and elevated railroads.**—The General Railroad Law of Illinois provides for the organization of corporations “for the purpose of constructing and operating any railroad” in the State. The Chicago and Southside Rapid Transit Company was organized under the act for the declared purpose of constructing a “railroad” between certain termini in the city of Chicago. Its real purpose was to construct an elevated railroad. The Supreme Court of Illinois held that such a purpose was within the act and that such a road could be built under the company’s charter, and that land could be condemned therefor.<sup>70</sup> A different conclusion was reached by the Supreme Court of Pennsylvania in construing the statutes of that State. It was held that an elevated street passenger railroad com-

Va. 205, 13 S. E. Rep. 369; *Arrington v. Savannah & W. R. R. Co.*, 95 Ala. 434, 11 So. Rep. 7.

<sup>70</sup> *Lieberman v. Chicago & S. S. R. T. R. Co.*, 141 Ill. 140, 30 N. E. Rep. 544. The court says: “We are able to perceive no reason why the word ‘railroad,’ as here used, should not be construed to apply to elevated railroads as well as to any others. While most railroads, for obvious reasons, are so constructed as to make their grade conform as nearly as practicable to that of the earth’s surface, yet it is a fact, with which every one is familiar, that they are sometimes constructed wholly beneath the surface, and sometimes upon an elevation above the surface. It is also a matter of common knowledge that an ordinary surface railroad may and often does, in different parts of its line, run through tunnels excavated beneath the surface, or upon structures so built as to elevate it above the surface. But

it has never been supposed that, whether they run beneath or above the surface, they are any the less entitled to the name of ‘railroads.’ Nor does the fact that a railroad is wholly underground or wholly raised above the surface make it any the less a railroad. The term ‘railroad,’ as used in the act of 1872, is clearly broad enough to include an elevated railroad; and we think the legislature clearly intended to use the word in a sense sufficiently broad and general to include railroads of that character. The same word, when used in the petitioner’s articles of incorporation, must be deemed to be used in a sense equally general. The petitioner, then, by its incorporation, became authorized to construct a railroad between the designated points; and the authority thus obtained included, *ex vi termini*, that of constructing an elevated railroad.”

pany could not be organized nor such a railroad constructed under the General Railroad Law of that State.<sup>71</sup> But there had been one course of legislation for ordinary steam railroads, and another for street passenger railroads, and the two systems had been kept quite distinct. Moreover the General Railroad Law expressly provided that the provisions of the act should "not be construed so as to authorize the formation of street passenger railway companies to construct passenger railways in any city or borough of this commonwealth." A similar conclusion has been reached by the New York courts in constructing the General Railroad Law of that State.<sup>72</sup> In the first case cited, which was a proceeding for condemnation, it was held that the General Railroad Law did not confer power to construct an elevated railroad through the city of New York, in the form of a two-story viaduct, having a height of seventy-five feet, and crossing the streets upon steel bridges sixty feet above the surface. Following this decision it was held in the other case that the same law did not authorize the construction of an ordinary elevated railroad along the streets of a city, and, of course, the company could not have condemned the easements of abutting owners for the purpose of its organization. But a company organized under the general railroad act may make a connection with an elevated railroad.<sup>73</sup> The general railroad laws of New York and Missouri have been held to authorize the formation of corporations to construct and operate horse and street railroads.<sup>74</sup> Statutes authorizing the condemnation of property for railroad purposes have been held not to apply to street rail-

<sup>71</sup> *Potts v. Quaker City El. R. R. Co.*, 161 Pa. St. 396, 29 Atl. Rep. 108; *S. C. 12 Pa. Co. Ct.* 593; *Commonwealth v. Northeastern R. R. Co.*, 161 Pa. St. 409, 29 Atl. Rep. 112.

<sup>72</sup> *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. Rep. 25; *Schafer v. Brooklyn & L. I.*

*R. R. Co.*, 124 N. Y. 630, 26 N. E. Rep. 311.

<sup>73</sup> *Beekman v. Brooklyn & B. R. R. Co.*, 89 Hun 84, 35 N. Y. Supp. 84.

<sup>74</sup> *In re Washington St. & C. R. R. Co.*, 115 N. Y. 442, 22 N. E. Rep. 356; *St. Louis R. R. Co. v. Northwestern R. R. Co.*, 2 Mo. App. 69.

roads.<sup>75</sup> Where a street railroad company was empowered to condemn private property when necessary for the construction, maintenance or operation of its road, it was held that the company could not deviate from the highway except to avoid obstructions or difficulties, which could not reasonably be otherwise overcome.<sup>76</sup>

§ 256c. **Same: Roads and streets.**—Statutes giving authority to lay out private roads are very strictly constructed and confined to the particular cases specified in the statute.<sup>77</sup> But authority to lay out a private road to the nearest highway does not mean that it must be laid out on the shortest line to the highway.<sup>78</sup> Authority to lay out private roads from dwellings and plantations to a public highway, does not authorize one from a coal bank or coal mine.<sup>79</sup> Authority to lay highways and townways includes a public footway.<sup>80</sup> Power to regulate and improve streets does not

<sup>75</sup> Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 25 Pac. Rep. 147, 3 Am. R. R. & Corp. Rep. 393; Rahn Tp. v. Tamaqua & L. St. R. R. Co., 4 Pa. Dist. Ct. 29. But see Matter of South Beach R. R. Co., 119 N. Y. 141, 23 N. E. Rep. 486, affirming 53 Hun 131, 25 N. Y. St. 328, 6 N. Y. Supp. 172; Matter of Rochester Electric R. R. Co., 57 Hun 56, 10 S. E. Rep. 379; Birmingham Union R. R. Co. v. Elyton Land Co., 114 Ala. 70; South & North Ala. R. R. Co. v. Highland Ave. etc. R. R. Co., 119 Ala. 105, 24 So. Rep. 114.

<sup>76</sup> Harvey v. Aurora etc. R. R. Co., 174 Ill. 295. The court says: "If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it impracticable to construct the road in the highway, a necessity might arise, within the meaning of the law,

which would authorize the company to leave the highway and go upon private property until the difficulty encountered was overcome, when a return could be made to the highway; or if sufficient land could not be had in the street for sidetracks, turn-outs, or stations, and the same were necessary for a successful operation of the road, under the statute the company would have the right to resort to private property."

<sup>77</sup> Killbuck Private Road, 77 Pa. St. 39; Klicker v. Guilbaud, 47 N. J. L. 277; Commissioners of Bibb County v. Harris, 71 Ga. 250; Lyon v. Hamor, 73 Me. 56.

<sup>78</sup> State v. Stockhouse, 14 S. C. 417.

<sup>79</sup> Calhoun's Road, 8 Pa. Co. Ct. 222; Palmer's Private Road, 16 Pa. Co. Ct. 340.

<sup>80</sup> Boston & A. R. R. Co. v. Boston, 140 Mass. 87.

confer authority to open streets.<sup>81</sup> Authority to lay out and vacate public roads, and to open or extend any street, lane or alley, was held not to authorize the widening of a twenty-foot alley to a fifty-foot street.<sup>82</sup> Authority to widen and straighten a street is not authority to extend it.<sup>83</sup> Authority to survey a highway that has become uncertain does not justify the taking of land not included in the street.<sup>84</sup> Under power to alter streets the width may be diminished,<sup>85</sup> but an entirely new road cannot be laid out between the termini of the old one.<sup>86</sup> Power to lay out and alter roads is power to lay out a new road and discontinue an old one for which the new is a substitute.<sup>87</sup> Under a general power to lay out highways it was held that a town had power to divert one channel of a stream into the other channel so as to avoid two bridges.<sup>88</sup>

§ 256d. Same: Statutes relating to the taking of materials for the repair of roads and bridges.—It is common to provide by statute that the proper officers may enter upon private property and take timber and materials for the repair of roads and bridges, the compensation to be afterwards adjusted. Where the constitution does not require prepayment for property taken, and adequate provision is made whereby the owner may obtain compensation, such statutes are valid.<sup>89</sup> Authority to enter upon unimproved lands and take materials for repairing highways and

<sup>81</sup> Knowles v. Muscatine, 20 Ia. 248.

<sup>82</sup> In re Liberty Alley, 8 Pa. St. 381.

<sup>83</sup> Widening of Thirty-fourth St., 10 Phila. 197.

<sup>84</sup> Beckwith v. Beckwith, 22 Ohio St. 180. But see Culver v. Fair Haven, 67 Vt. 163, 31 Atl. Rep. 143.

<sup>85</sup> Helple v. Clackamas County, 20 Or. 147, 25 Pac. Rep. 291. And see Williams v. Carey, 73 Ia. 194, 34 N. W. Rep. 813.

<sup>86</sup> Gloucester v. County Comrs., 3 Met. 375.

<sup>87</sup> Millcreek Road, 29 Pa. St. 195.

<sup>88</sup> Anthony v. Adams, 1 Met. 284.

<sup>89</sup> Branson v. Gee, 25 Or. 462, 36 Pac. Rep. 527; Cherry v. Matthews, 25 Or. 484, 36 Pac. Rep. 529; Cherry v. Lane County, 25 Or. 487, 36 Pac. Rep. 531; McCosker v. Burrell, 55 Ind. 425. And see Lindell v. Hannibal etc. R. R. Co., 25 Mo. 550; Palmer v. State, Wright, (Ohio) 364.



bridges does not authorize the taking of timbers which the owner has prepared for his own use,<sup>90</sup> nor justify an entry upon improved lands.<sup>91</sup> Such an authority must be construed as giving a reasonable discretion to the officer charged with its execution. He is not confined to the land immediately adjacent to the place where the material is used, but he may not take the material at will anywhere in his jurisdiction.<sup>92</sup>

§ 256e. **Same: Miscellaneous.**—Under authority to construct ditches from a highway to a natural water-course, one cannot be made to a pond.<sup>93</sup> Power to drain the low or swamp lands of one man across the lands of another does not authorize a drain onto the lands of another, unless it connects with some pond or water-course so as to produce no harm.<sup>94</sup> Where ditches were allowed to be established which would be of benefit to any highway or street of any town or city, the turnpike of an incorporated company was held to be within the act.<sup>95</sup> A statute for draining lands, provided for the construction of levees, if necessary to accomplish the drainage sought. Held not to authorize a levee sixty miles long not connected with any drain or ditch.<sup>96</sup> A statute, for the purpose of drainage, permitted the straightening, etc., of the channel of a water course. Held not to authorize such straightening as a principal object when the drainage was a mere incident.<sup>97</sup> Under authority to erect a dam and reservoir for the use of a corporation and of mills below, the corporation may maintain a dam and sell part of the power to the lower mills.<sup>98</sup> Power to build a dam for working a water mill, does not authorize a dam to raise water for floating logs to a steam mill.<sup>99</sup> Authority to condemn for a mill does

<sup>90</sup> *Goodman v. Bradley*, 2 Wis. 257.

<sup>91</sup> *Jackson v. Rankin*, 67 Wis. 285.

<sup>92</sup> *Collins v. Crecy*, 8 Jones L. 333.

<sup>93</sup> *McLaughlin v. Sandusky*, 17 Neb. 110.

<sup>94</sup> *Sherman v. Tobey*, 3 Allen, 7.

<sup>95</sup> *Neff v. Reed*, 98 Ind. 341.

<sup>96</sup> *Urdike v. Wright*, 81 Ill. 49.

<sup>97</sup> *Scruggs v. Reese*, 128 Ind. 399, 27 N. E. Rep. 748.

<sup>98</sup> *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522.

<sup>99</sup> *Dixon v. Eaton*, 68 Me. 542.

not authorize a taking for a tail race.<sup>1</sup> Under authority to "acquire, to open and to lay out public grounds or squares, streets, alleys and highways," land cannot be condemned for a city prison.<sup>2</sup> A statute provided for the condemnation of land "to construct a canal or a railroad or a turnpike, graded, macadamized or plank road or bridge or a work of public utility." It was held not to authorize condemnation for a ferry.<sup>3</sup> An existing corporation was authorized to take the waters of certain specified ponds and to "construct, lay down and maintain, any dam or dams, pipes, fountains, or reservoirs whatsoever, upon or over any land whatsoever." The only provision for compensation was to persons suffering damage "by the taking the water aforesaid." It was held it could only take the waters mentioned and that it could not condemn land for a dam or for flooding.<sup>4</sup> Under a power to construct a system of sewage disposal, a city cannot condemn the right to discharge a sewer upon a tract of land, leaving the owner to dispose of it as he can.<sup>5</sup> A statute authorizing the formation of corporations to improve the navigation of any river does not authorize an incorporation to improve a stream not navigable for any purpose in a state of nature.<sup>6</sup> Under authority to take materials "necessary for the prosecution of the improvements intended by this act and to make all such canals," etc., it was held that materials could be taken for repairs as well as for construction.<sup>7</sup> Authority to condemn land for a cemetery does not permit the taking of land for a road to a cemetery.<sup>8</sup> Power to regulate public landings does not give power to lay out new landings.<sup>9</sup> An act in regard to the construction of waterworks gave power

<sup>1</sup> Coalter v. Hunter, 4 Rand. 58.

<sup>2</sup> East St. Louis v. St. John, 47 Ill. 463.

<sup>3</sup> Sandford v. Martin, 31 Ia. 67.

<sup>4</sup> Pickman v. Peabody, 145 Mass. 480.

<sup>5</sup> Colby v. La Grange, 65 Fed. Rep. 554.

<sup>6</sup> East Branch etc. Imp. Co. v. Lumber Co., 69 Mich. 207, 37 N. W. Rep. 192.

<sup>7</sup> Bates v. Cooper, 5 Ohio, 115.

<sup>8</sup> Fore v. Hoke, 48 Mo. App. 254.

<sup>9</sup> Commissioners v. Judges, 17 Wend. 9; Pearsall v. Post, 20 Wend. 111.

"to lay down all such pipes and conduits for water" as should be necessary and proper to carry into effect the act. It was held that land might be taken for an open conduit to convey water from a pond to a pumping station.<sup>10</sup> A company was empowered to furnish the town of B with water for the extinguishment of fires and "for domestic, sanitary and other purposes." Held the words "other purposes," must be construed to mean other like purposes, that is, such as were a public use, and that water could not be taken for the purpose of furnishing mechanical power.<sup>11</sup> A general act entitled "An Act to empower cities to acquire land for public use by condemnation," and which authorizes them to condemn land "for any lawful public use or purpose," applies only to such public uses as the city is otherwise empowered to promote.<sup>12</sup> A law specifying particular purposes for which land may be condemned, by implication, excludes other purposes.<sup>13</sup> Authority to condemn for telegraph lines includes telephone lines.<sup>14</sup>

§ 257. Meaning of the words "to," "from," "at" or "near" a place, in statutes describing termini and location.—These words must receive a reasonable construction, and in such statutes have uniformly been held to be inclusive.<sup>15</sup> Authority to construct a road to or from a place is confined to the territory then within the corporate limits, and does

<sup>10</sup> *Cheyney v. Atlantic City W. Co.*, 55 N. J. L. 235, 26 Atl. Rep. 95. And see *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. Rep. 484.

<sup>11</sup> *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. Rep. 109, 3 Am. R. R. & Corp. Rep. 136.

<sup>12</sup> *State v. City of Newark*, 54 N. J. L. 62, 23 Atl. Rep. 129. And see *In re Thompson*, 86 Hun 405, 33 N. Y. Supp. 467.

<sup>13</sup> *City of Detroit v. Wabash etc. R. R. Co.*, 63 Mich. 712, 30 N. W. Rep. 321; *City of Syracuse v. Benedict*, 86 Hun 343, 33 N. Y.

Supp. 944; *In re Thompson*, 86 Hun 405, 33 N. Y. Supp. 467; and most of the cases heretofore cited in this section.

<sup>14</sup> *Gulf etc. R. R. Co. v. S. W. Tel. & Tel. Co.*, 18 Tex. Civ. App. 500, 45 S. W. 151; and see 8 Am. R. R. & Corp. Rep. p. 851.

<sup>15</sup> *To: Farmer's Turnpike v. Coventry*, 10 Johns. 389; *Moses v. Pittsburgh etc. R. R. Co.*, 21 Ill. 516; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; *Rio Grande R. R. Co. v. Brownsville*, 45 Tex. 88.

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not authorize an extension into new territory afterwards added.<sup>16</sup> A statute fixing a terminus of a railroad at or near a place was held to be satisfied in one case by a location 2,475 feet from the place,<sup>17</sup> and in another by a location a mile and a half away.<sup>18</sup> A statute fixing the eastern terminus of the Union Pacific Railroad at a point "on the western boundary of Iowa" was held to be satisfied by a point on the east shore of the Mississippi River.<sup>19</sup>

§ 258. **Change of location.**—In nearly all statutes conferring the power of eminent domain, some discretion is left with those who are vested with the power, in respect to the designation of the property to be taken. Formerly, when public works were constructed mostly under special laws and charters, it was common to specify with more or less particularity the termini and route of any proposed railroad, canal or other public way. In the present day it is more common to provide by general laws for all works of

R. R. Co. v. Adams, 3 Head, 596; Western Pennsylvania R. R. Co.'s Appeal, 99 Pa. St. 155; Chicago & Northwestern Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ill. 589; McCartney v. Chicago & Evanston R. R. Co., 112 Ill. 611; Hazelhurst v. Freeman, 52 Ga. 244; St. Louis etc. R. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. Rep. 483; In re Bronson, 1 Ontario, 415. See Brock v. Dore, 166 Mass. 161, 44 N. E. Rep. 142.

At or near: Mason v. Brooklyn City & Newton R. R. Co., 35 Barb. 373; Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige, 554; State v. Hudson Tunnel R. R. Co., 38 N. J. L. 548; Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. 475; Griffin v. House, 18 Johns. 397; Purifoy v. Richmond

& D. R. R. Co., 108 N. C. 100, 12 S. E. Rep. 741.

Generally: Pierce on Railroads, p. 258. The only case holding a contrary doctrine is North Eastern R. R. Co. v. Payne, 8 Rich. S. C. 177, which holds that authority to construct a road "from Charleston" would not permit the company to enter the city.

<sup>16</sup> Commonwealth v. Erie & North East R. R. Co., 27 Pa. St. 339; Pontchartrain R. R. Co. v. La Fayette & Pontchartrain R. R. Co., 10 La. An. 741; Choze v. Detroit & Howell Plank Road Co., 37 Mich. 195.

<sup>17</sup> Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 5 Allen 221.

<sup>18</sup> Parke's Appeal, 64 Pa. St. 137.

<sup>19</sup> Union Pacific R. R. Co. v. Hall, 91 U. S. 343.

this character under which both the route and termini are left to the determination of those who choose to avail themselves of the statute. In such cases the articles of incorporation take the place, somewhat, of the former special charters, and, in so far as they designate the location, route or termini of the proposed work, would probably receive a similar construction.<sup>20</sup> When the choice or discretion which is thus given by statute has been exercised, the power is exhausted, and the location cannot be changed.<sup>21</sup> But this principle is not to be applied too rigidly. A general or material change of location cannot be made. But minor changes can be made, which experience or change of circumstances have demonstrated to be necessary or desirable. The growth of a town in a certain direction may make a former location of a depot very inconvenient. A railroad may be destroyed by a mountain slide or a washout in such a way that reconstruction would be impracticable or impossible. In such cases it seems to us a change of location may be made so as to obviate the inconvenience in the one case or the difficulty in the other. And so are the authorities. Where the location of a lock-house on a canal proves

<sup>20</sup> Under authority to file amended articles of incorporation to correct any defect or informality in the original, it was held that a change could not be made in the location and termini of the road. *Matter of Riverhead etc. R. R. Co.*, 36 N. Y. App. Div. 514.

<sup>21</sup> *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 22 Barb. 358; *Mason v. Brooklyn City & Newton R. R. Co.*, 35 Barb. 373; *People v. New York & Harlem R. R. Co.*, 45 Barb. 73; *Hudson & Delaware Canal Co. v. New York & Erie R. R. Co.*, 9 Paige 323; *Morris & Essex R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 205; *McMurtrie v. Stewart*, 21 Pa. St. 322; *Morrow v. Common-*

*wealth*, 48 Pa. St. 305; *State v. New Haven etc. Co.*, 45 Conn. 331; *Lehigh Valley Coal Co. v. U. S. Pipe Line Co.*, 7 Luzerne Leg. Reg. Rep. 77; *In re Providence & W. R. R. Co.*, 17 R. I. 324, 21 Atl. Rep. 965; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. Rep. 601; *Leverett v. Middle Georgia etc. R. R. Co. (Ga.)*, 24 S. E. Rep. 154; *Lushy v. Kansas City etc. R. R. Co.*, 73 Miss. 360, 19 So. Rep. 239; *McKay v. Pa. Water Co.*, 6 Pa. Dist. Ct. 364; *Pierce on Railroads*, p. 254. Contra: *Ex parte South Carolina R. R. Co.*, 2 Rich. L. S. C. 434. See *Washington etc. R. R. Co. v. Coeur D'Alene R. & N. Co.*, 60 Fed. Rep. 981, 9 C. C. A. 303.

inconvenient or unsuitable, a new location can be made.<sup>22</sup> In another case two railroads intersected at G and crossed the Y river, not far from that place, on independent bridges. These were burnt during the war. After the war, both roads being much crippled financially, they united in building one bridge on the line of one of the roads, and the other condemned a short intersecting line in order to avail itself of the new bridge. It was held that it might lawfully do so.<sup>23</sup> Where the statute gave the right to railroad corporations to make a change of location, whenever a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty of construction or inability to procure right of way at a reasonable cost, it was held that the privilege must be exercised before completion.<sup>24</sup> Where a railroad is permitted to deviate not exceeding one mile from the route laid down in its maps and plans, it may not extend its road a mile.<sup>25</sup> The charter of a horse railroad company authorized it to use a certain street, and provided that, in order to avoid an obstruction on that street, it might use such portions of any of the adjacent streets as might be necessary. It was held that, after the obstruction was removed, it could lay its track on the first-named street.<sup>26</sup> Where the power to change the location of a railroad was expressly given by statute, it

<sup>22</sup> *Ligat v. Commonwealth*, 19 Pa. St. 456. In this case the court say: "If a lot of ground, on which a lock-house has been erected, should be deemed no longer suitable or convenient for its appropriate uses, the canal commissioners have power to take possession of other ground for the purpose of erecting a new lock-house. Their power is not exhausted by the first appropriation. Errors of location, in matters of that kind, which are but incidents to the main work, may be corrected without special application to the legislature."

<sup>23</sup> *Mississippi & Tennessee R. Co. v. Devaney*, 42 Miss. 555.

<sup>24</sup> *Moorehead v. Little Miami R. R. Co.*, 17 Ohio, 340; *Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 235; *Atkinson v. Marietta & Cincinnati R. R. Co.*, 15 Ohio St. 21.

<sup>25</sup> *Murphy v. Kingston etc. R. Co.*, 11 Ontario, 582, reversing S. C. 11 Ontario 302. The following cases construe statutes permitting a change of location, *Boston etc. R. R. Co. v. Midland R. R. Co.*, 1 Gray 340; *Hewitt v. St. Paul etc. R. R. Co.*, 35 Minn. 226.

<sup>26</sup> *Phila. & Gray's Ferry Pas-*

was held it could be exercised after a partial construction of the road.<sup>27</sup>

§ 259. **Successive appropriations.**—In the absence of any restriction or limitation, the power to take private property may be exercised by the grantee from time to time as necessity requires. If this were not so, it would be necessary to anticipate all future needs at the outset. The company condemning would thus not only have to take and pay for property in advance, but it might be saddled with property which it could never use at all. On the other hand, either from taking too narrow a view of the future or from the growth of business beyond any reasonable anticipation, it might in a few years find itself unable properly to discharge its duties to the public.<sup>28</sup> Accordingly a railroad company, after having located and completed its road, may, as the expansion of its business requires, and within the limitations imposed by statute, if any, take additional land for right of way,<sup>29</sup> terminal facilities,<sup>30</sup> depot accommodations,<sup>31</sup> side tracks,<sup>32</sup> branches,<sup>33</sup> shops,<sup>34</sup> or for any other

senger Ry. Co.'s Appeal, 102 Pa. St. 123.

<sup>27</sup> Eel River & Eureka R. R. Co. v. Field, 67 Cal. 429; Cape Girardeau etc. Road Co. v. Dennis, 67 Mo. 438.

<sup>28</sup> Hamilton v. Annapolis & Elk Ridge R. R. Co., 1 Md. 553; S. C. 1 Md. Ch. 107; In re Providence & W. R. R. Co., 17 R. I. 324, 21 Atl. Rep. 965.

<sup>29</sup> Prather v. Jeffersonville etc. R. R. Co., 52 Ind. 16; Peck v. New Albany & Chicago R. R. Co., 101 Ind. 366; Chicago & Western Ind. R. R. Co. v. Illinois Central R. R. Co., 113, Ill. 156; Cooper v. Anniston etc. R. R. Co., 85 Ala. 106; Matter of South Brooklyn R. & T. Co., 50 Hun 405, 18 N. Y. St. 51, 2 N. Y. Supp. 613; Matter of New York Central etc. R. R. Co., 67 Barb. 426.

<sup>30</sup> Central Branch U. P. R. R.

Co. v. Atchison, Topeka & Santa Fe R. R. Co., 26 Kan. 669.

<sup>31</sup> Deitrichs v. Lincoln & North Western R. R. Co., 13 Neb. 361.

<sup>32</sup> Philadelphia, Wilmington & Balt. R. R. Co. v. Williams, 54 Pa. St. 103; St. Louis etc. R. R. Co. v. Petty, 57 Ark. 359, 21 S. W. Rep. 884; Ewing v. Ala. & Va. R. R. Co., 68 Miss. 551, 9 So. Rep. 295; Toledo & W. R. R. Co. v. Daniels, 16 Ohio St. 390. In the last case it is said: "Prima facie power to do any act is power to do it in such manner and at such time as is usual, convenient and reasonable,—in such way as prudent men manage their own concerns."

<sup>33</sup> Pittsburgh, V. & C. R. R. Co. v. Pittsburgh, C. & S. L. R. R. Co., 159 Pa. St. 331, 28 Atl. Rep. 155.

<sup>34</sup> Chicago, Burlington &

purpose for which its compulsory powers may be exercised.<sup>35</sup> A company to supply a city with water may make successive appropriations of land or water, as the population and demands for water increase.<sup>36</sup> So in regard to a power to take lands in order to secure materials for an aqueduct.<sup>37</sup> A horse railroad company, authorized to lay two tracks upon a street, may lay one at one time and one at another.<sup>38</sup> A special act authorized the connection of two railroads by tracks on the streets of a city upon consent of the people given, and such consent was given and the tracks constructed. It was held that the power was exhausted and that an additional track could not be laid thirty years after, though a fresh consent was obtained.<sup>39</sup> Where a railroad sixty-six feet wide is purchased by another company which had power to condemn a hundred feet in width, it was held the latter company, after operating the road for several years, might widen to a hundred feet.<sup>40</sup> Where park commissioners have power to connect any public park with any part of any incorporated city by taking any street or streets leading to such park, the power is not exhausted by taking one street.<sup>41</sup> The power to establish harbor lines, like the power to establish the grade of streets,<sup>42</sup> is a continuing power, and new lines may be

Quincy R. R. Co. v. Wilson, 17 Ill. 123.

<sup>35</sup> Fisher v. Chicago & Springfield R. R. Co., 104 Ill. 323; Virginia & Truckee R. R. Co. v. Lovejoy, 8 Nev. 100; Simpson v. Lancaster & Carlisle Ry. Co., 15 Sim. 580; Stamps v. Birmingham & Stone Valley Ry. Co., 2 Phillips 673; Brown v. Philadelphia, W. & B. R. R. Co., 58 Md. 539.

<sup>36</sup> Johnson v. Utica Water Works Co., 67 Barb. 415; Water Commissioners v. Lawrence, 3 Edw. Ch. 552; Edgewood Water Co. v. Troy Water Co., 7 Pa. Co. Ct. 476.

<sup>37</sup> Matter of Water Commissioners, 3 Edwards Ch. 552.

<sup>38</sup> People's Passenger Ry. Co. v. Baldwin, 14 Phila. 231; Ranson v. Citizens R. R. Co., 104 Mo. 375, 16 S. W. Rep. 416; Varwig v. Cleveland etc. R. R. Co., 6 Ohio C. C. 439.

<sup>39</sup> Savannah & W. R. R. Co. v. Woodruff, 86 Ga. 94, 13 S. E. Rep. 156.

<sup>40</sup> Childs v. Central R. R. Co. of N. J., 33 N. J. L. 323.

<sup>41</sup> West Chicago Park Comrs. v. McMullen, 134 Ill. 170, 25 N. E. Rep. 676.

<sup>42</sup> Ante, § 107.



established which operate to discontinue old ones.<sup>43</sup> Where a railroad company is authorized to condemn not exceeding one hundred feet for right of way, it cannot acquire a right of way by purchase and then condemn an additional hundred feet.<sup>44</sup>

§ 260. Where the provisions of one statute are adopted by another, or extended to another jurisdiction.—This is frequently done in statutes relating to eminent domain, and sometimes leads to great confusion and perplexity. The courts will, if possible, in such cases effectuate the intention of the legislature.<sup>45</sup> Certain commissioners were authorized to remove all dams on a stream and to execute other works for the benefit of health and drainage. The act provided that the damages should be assessed “in the same manner” as in laying out highways. This was held to mean that similar proceedings should be had, so far as applicable to the subject-matter, and that much was left to implication in the manner of adapting the proceedings to the subject-matter.<sup>46</sup> A statute in reference to assessing betterments in Boston was made applicable to the city of Charlestown. In Boston the authority was vested in the board of aldermen, which also had general authority to lay out streets. In applying the act to Charlestown it was held that the authority did not vest in its board of aldermen, but in the body which had jurisdiction in laying out and improving streets, viz.: the city council.<sup>47</sup> Where an act provided that in case of land taken for parks the proceed-

<sup>43</sup> *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561.

<sup>44</sup> *Crandall v. Des Moines etc. R. R. Co.*, 103 Ia. 684.

<sup>45</sup> See generally *Craig v. Supervisors*, 10 Wend. 585; *Road York Water Co.*, 24 Pa. St. 397; *Taylor v. Pettifjohn*, 24 Ill. 312; *Frodbent v. Imperial Gas Light Co.*, 7 De G. M. & G. 436, 3 Jur. N. S. 221, 26 L. J. Ch. 276; *Ferrar v. Comrs.*, 4 L. R. Exch.

227, 38 L. J. Exch. 102, 21 L. T. N. S. 295, 17 W. R. 709; *Daughey v. London*, 38 L. J. C. P. 298, 17 W. R. 1106, 20 L. T. N. S. 921; *Terre Haute v. Evansville etc. R. Co.*, 149 Ind. 174.

<sup>46</sup> *Phillips v. County Commissioners*, 122 Mass. 258.

<sup>47</sup> *Lockwood v. Charlestown*, 114 Mass. 416. For a similar case see *Day v. Board of Aldermen of Springfield*, 102 Mass. 310.

ings should be the same as in case of street openings, it was held to mean that the proceedings in park cases should conform to the law applicable to streets as it exists from time to time when park proceedings are begun.<sup>48</sup> An act to enable cities to build sewers and to acquire lands for that purpose required that the proceedings therefor should conform to the proceedings *now* provided by law for the acquiring of land for the opening of streets in such cities. It was held that in proceedings by a city to acquire land for a sewer, it must conform to the special provisions in its charter for acquiring land for a street, whatever they may be.<sup>49</sup> If the act adopted or referred to provides for an appeal or review, an appeal or review may be had.<sup>50</sup> Where a telegraph company was authorized to condemn and to proceed as provided in a specified chapter relating to railroads, it was held that the chapter was adopted as then existing and not as afterwards amended.<sup>51</sup>

§ 261. **Validity and effect of statutes legalizing defective proceedings.** —The legislature may legalize irregular or defective proceedings which it might have authorized in the form in which they have been taken.<sup>52</sup> If the defect is one of power, it can be supplied by a subsequent act.<sup>53</sup> In all

<sup>48</sup> *In re Vernon Park*, 163 Pa. St. 70, 29 Atl. Rep. 972.

<sup>49</sup> *State v. City of Jersey City*, 54 N. J. L. 49, 22 Atl. Rep. 1052.

<sup>50</sup> *Austin v. Belleville etc. R. Co.*, 19 Ill. 310; *C. Street*, 118 Pa. St. 171, 12 Atl. Rep. 345; *In re Vernon Park*, 163 Pa. St. 70, 29 Atl. Rep. 972.

<sup>51</sup> *Postal Tel. Cable Co. v. Southern R. R. Co.*, 98 Fed. Rep. 190.

<sup>52</sup> *O'Brien v. Commissioners of Baltimore County*, 51 Md. 15; *Pitkin v. Springfield*, 112 Mass. 509; *Spaulding v. Nourse*, 143 Mass. 490; *State v. Bruggerman*, 31 Minn. 493; *People ex rel. etc. v. McDonald*, 69 N. Y. 362; *Burgett v. Norris*, 25 Ohio St. 308;

*Mattingly v. District of Columbia*, 97 U. S. 687; *Burns v. Multnomah*, 8 Sawyer 543; *State v. Newark*, 27 N. J. L. 185; *State v. Union*, 33 N. J. L. 350; *State v. Bergen*, 34 N. J. L. 438; *State v. Passaic*, 36 N. J. L. 332; *State v. Passaic*, 37 N. J. L. 65; *Board of Water Comrs. v. Dwight*, 101 N. Y. 9; *Clinton v. Walliker*, 98 Ia. 655, 68 N. W. Rep. 431; *Bennett v. Fisher*, 26 Ia. 497; *Richman v. Board of Supervisors*, 77 Ia. 513, 42 N. W. Rep. 422. *Contra*, *Selbert v. Linton*, 5 W. Va. 57.

<sup>53</sup> *Spaulding v. Nourse*, 143 Mass. 490; *Himmelman v. Hoadley*, 44 Cal. 213; *Hoadley v. San Francisco*, 50 Cal. 265.

cases, however, intervening rights must not be impaired.<sup>54</sup> It is no objection to such an act that it is passed while an appeal or certiorari is pending to review the proceedings.<sup>55</sup>

§ 261a. The legislature cannot surrender or preclude itself from the exercise of the eminent domain power.—If this were not so it would be possible for one legislature to block and render forever impossible the most needed and valuable public improvements. A legislature could grant a right of way across the State and make a binding stipulation that it should never be crossed by any other line of transportation or communication. And if the eminent domain power could thus be bargained away, so could the police power and power of taxation. The State might thus soon cease to be sovereign, and corporations and franchise-holders become the dominant power. The result of this process of reasoning is that the sovereign powers of the State cannot be bargained away, restrained, surrendered or extinguished by the action of the legislature.<sup>56</sup> If there is any exception to this rule it applies to the power of taxation only, which may be surrendered or commuted, as to particular persons or property, for a valuable consideration received by the State.<sup>57</sup> But even this exception has not been established without emphatic protest. Judge Cooley sums up his discussion of this subject as follows: "It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national constitution

<sup>54</sup> *Mattingly v. District of Columbia*, 97 U. S. 687; *Schumaker v. Toberman*, 56 Cal. 508; *Holli-day v. City of Atlanta*, 96 Ga. 377, 23 S. E. Rep. 406; *Board of Comrs. v. Fahlor*, 132 Ind. 426, 31 N. E. Rep. 1112.

<sup>55</sup> *State v. Newark*, 27 N. J. L. 185; *State v. Union*, 33 N. J. L. 350.

<sup>56</sup> *Cooley Const. Lim.* 6th Ed. pp. 337-342.

<sup>57</sup> *Cooley Const. Lim.* 6th Ed. pp. 148, 337, 338.

now under consideration. If the tax cases are to be regarded as an exception to this statement, the exception is perhaps to be considered a nominal rather than a real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as laws in these cases have been supposed to be based upon a consideration by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode."<sup>58</sup> The authorities are quite conclusive to the effect that the police power cannot be surrendered or restricted.<sup>59</sup> And we believe that the authorities are equally emphatic with respect to the eminent domain power.<sup>60</sup> An agreement or stipulation, either by the State or a municipal corporation, that the power of eminent domain shall not be exercised in a particular manner or in respect to certain property, is null and void.<sup>61</sup> The granting of an exclusive privilege or franchise is neither in form or substance an agreement that the power of eminent domain shall not be exercised to take or interfere with such franchise or privilege. The exclusive feature is inserted in order to induce private parties to invest their capital in an enterprise which might otherwise be rendered

<sup>58</sup> Cooley Const. Lim. 6th Ed. pp. 341, 342.

<sup>59</sup> New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Butchers Union Co. v. Crescent City Co., 111 U. S. 746; Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Stone v. Mississippi, 101 U. S. 814.

<sup>60</sup> Lock Haven Bridge Co. v. Clinton County, 157 Pa. St. 379, 27 Atl. Rep. 726; Brewster

v. Hough, 10 N. H. 138; Matter of Opening First Street, 66 Mich. 42, 33 N. W. Rep. 15; Hyde Park v. Cemetery Ass., 119 Ill. 141; In re Twenty-second Street, 102 Pa. St. 108, S. C. 15 Phil. 409; Brimmer v. Boston, 102 Mass. 19; People v. Adirondack R. R. Co., 160 N. Y. 225, 238.

<sup>61</sup> Ibid. A contract between a city and a railroad company that no street should be opened over its property was held void. Matter of Opening First Street, 66 Mich. 42, 33 N. W. Rep. 15. And see also In re Southern Boulevard R. R. Co., 146 N. Y. 352, 40 N. E. Rep. 1000; 143 N. Y. 258, 38 N. E. Rep. 276.

valueless without redress by the making of similar grants to others. The legislature thereby simply creates a valuable right or property, but this property remains subject to the eminent domain power, like any other property.<sup>62</sup> A provision in a charter that the property of the company shall not be taken for certain public uses, is void as a contract, and amounts simply to the expression of a legislative intent that, for the time being, the power of eminent domain shall not be so exercised.<sup>63</sup> The legislature having full power to grant or withhold the exercise of the right of eminent domain, it is competent for it to provide that streets shall not be laid through cemeteries or railroad grounds, but it is also competent to reverse this policy at any time.

§ 261b. Exercise of the power by Congress.—Congress, as the national legislature, may exercise the power of eminent domain, for the promotion of any purpose within its constitutional powers, and subject to the limitation contained in the federal constitution.<sup>64</sup> As the local legislature of the District of Columbia, it may exercise the power for any municipal or legitimate public use.<sup>65</sup> In taking property in the states, it may provide a procedure of its own, or adopt or make use of that provided by the states.<sup>66</sup>

§ 261c. Constitutionality of eminent domain statutes generally.—Statutes which provide for an exercise of the eminent domain power must not only comply with the eminent domain provisions of the constitution, but with those provisions which relate to the manner and form of legislation or which otherwise limit the power of the legislature. The statute, either by itself or in connection with other legislation, must provide for compensation.<sup>67</sup> The

<sup>62</sup> Ante, § 137; post, §§ 274, 275.

<sup>63</sup> *Hyde Park v. Cemetery Ass.*, 119 Ill. 141; *In re Twenty-second St.*, 102 Pa. St. 108, 15 Phil. 409.

<sup>64</sup> *Luxton v. North Riv. Bridge Co.*, 153 U. S. 525.

<sup>65</sup> *Shoemaker v. United States*, 147 U. S. 282, 13 S. C. Rep. 361;

*United States v. Cooper*, 9 Mackey 104.

<sup>66</sup> *Jones v. United States*, 48 Wis. 385; *In re Secretary of the Treasury*, 45 Fed. Rep. 396.

<sup>67</sup> Post, § 452. *Brunswick & W. R. R. Co. v. City of Waycross*, 94 Ga. 102, 21 S. E. Rep. 145; *Cherry v. Board of Comrs.*, 52 N.

taking must be for a public use<sup>68</sup> and that use must be defined in the act.<sup>69</sup> The statute must not be obnoxious to the constitutional provisions as to local and special legislation,<sup>70</sup> nor to the provision that a person shall not be deprived of his property without due process of law,<sup>71</sup> nor to any other limitations.<sup>72</sup> It must conform to the provision as to the title of acts<sup>73</sup> and to all other provisions as to the manner of passing laws.

J. L. 544, 20 Atl. Rep. 970; In re Widening of Burnish St., 140 Pa. St. 531, 21 Atl. Rep. 500; Tuttle v. Justice of Knox County, 89 Tenn. 157, 14 S. W. Rep. 486; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. & Corp. Rep. 258.

<sup>68</sup> See chap. 7. State v. City of Orange, 54 N. J. L. 111, 22 Atl. Rep. 1004.

<sup>69</sup> In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. Rep. 238.

<sup>70</sup> City of Pasadena v. Stinson, 91 Cal. 238, 27 Pac. Rep. 604; Commissioners of Parks and Boulevards v. Moesta, 91 Mich. 149, 51 N. W. Rep. 903; New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. Rep. 1088;

Swikehard v. Michels, 8 Misc. 568, 29 N. Y. Supp. 777; Matter of Lexington Ave., 29 Hun 303; 63 How. Pr. 462; Appeal of Wilbert, 137 Pa. St. 494, 21 Atl. Rep. 74.

<sup>71</sup> Post, §§ 363-368. Smith v. Cochrane, 9 Wash. 85, 37 Pac. Rep. 311, 494.

<sup>72</sup> People v. Township Board, 25 Mich. 153; Memphis etc. R. R. Co. v. Birmingham etc. R. R. Co., 96 Ala. 571, 11 So. Rep. 642; State v. Commissioners (Ohio) 43 N. E. Rep. 537; Senor v. Board of Comrs., 13 Wash. 48, 42 Pac. Rep. 552.

<sup>73</sup> Sweet v. City of Syracuse, 128 N. Y. 680, 27 N. E. Rep. 1081; Adams v. San Angelo Water Works Co., 86 Tex. 486, 25 S. W. Rep. 605.

## CHAPTER X.

### WHAT MAY BE TAKEN.

§ 262. All property subject to the right of eminent domain.—All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain.<sup>1</sup> “The right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public use when necessity demands it.”<sup>2</sup> These conclusions follow logically from the nature of the power itself. Notwithstanding this, many doubts and controversies have arisen, both as to the extent of the power itself, and as to the construction of particular delegations of it by the legislature. These will form the subject of the present chapter.

§ 262a. Land and rights and easements in are appurtenant thereto.—Land and all estates, rights, interests and easements in, or appurtenant thereto, may be taken under the power of eminent domain.<sup>3</sup> There may be a question

<sup>1</sup> New York etc. R. R. Co. v. Boston etc. R. R. Co., 36 Conn. 196; Eastern R. R. Co. v. Boston & Maine R. R. Co., 111 Mass. 125; New York, Housatonic & Northern R. R. Co. v. Boston, Hartford & Erie R. R. Co., 36 Conn. 196; Water Works Co. v. Burkhart, 41 Ind. 364; People v. B. & O. R. R. Co., 117 N. Y. 150, 22 N. E. Rep. 1026; People v. Adirondack R. R. Co., 160 N. Y. 225, 238.

<sup>2</sup> Metropolitan City Ry. Co. v. Chicago West Div. Ry. Co., 87 Ill. 317, 324. “All property is held subject to an inherent right in the government to appropriate

it to public use when the public good may require it to be done.” Alabama & Florida R. R. Co. v. Kenney, 39 Ala. 307.

<sup>3</sup> Buffalo, New York & Phila. R. R. Co. v. Overton, 35 Hun 157; Rensselaer v. Leopold, 106 Ind. 29; Alexandria etc. R. R. Co. v. Faunce, 31 Gratt. 761; Metropolitan El. R. R. Co. v. Dominick, 55 Hun 198, 27 N. Y. St. 576, 8 N. Y. Supp. 151; Ray v. New York Bay Extension R. R. Co., 34 N. Y. App. Div. 3; Los Angeles v. Pomerooy, 124 Cal. 597, 57 Pac. Rep. 585. “The right to appropriate property for public use includes

whether the taking of a particular property, right or easement has been authorized, but if the intention of the legislature is clear, its power is beyond question.<sup>4</sup> The right of a corporation to maintain one or more bridges across a street may be condemned.<sup>5</sup> The rights of riparian<sup>6</sup> and abutting owners<sup>7</sup> may be condemned without taking any estate in the land to which they pertain.

§ 263. **Money, contracts, choses in action and other personal property.**—The distinction should be borne in mind between the power of eminent domain as it exists unrestricted in the State and as it exists in the legislature limited by the constitution. Undoubtedly money and all kinds of personal property are subject to the State's power of eminent domain.<sup>8</sup> Sharswood, J., in speaking of this question, says: "I am not able, and do not feel disposed, to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the State in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of an invasion by the public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations or individuals."<sup>9</sup> But, when we consider the power of the legislature as limited by the constitution, it may well be doubted whether it can authorize the direct appropriation of money. Some constitutions require that compensation shall be first made, and some require it to be ascer-

not only the tangible thing owned, but every right and incident which accompanies ownership." *Baker v. Rochester*, 24 N. Y. App. Div. 383.

<sup>4</sup> *People v. B. & O. R. R. Co.*, 117 N. Y. 150, 22 N. E. Rep. 1026; *Metropolitan City R. R. Co. v. Chicago West Div. R. R. Co.*, 87 Ill. 317.

<sup>5</sup> *Trustees v. City of Atlanta*, 93 Ga. 468, 21 S. E. Rep. 74.

<sup>6</sup> *Bigelow v. Draper*, 6 N. D. 152.

<sup>7</sup> See cases cited in §§ 115b, 493a.

<sup>8</sup> *Dwight on the Law of Person and Property*, p. 559. As to impressment of slaves see *Tyson v. Rogers*, 33 Ga. 473.

<sup>9</sup> *Hammett v. Philadelphia*, 65 Pa. St. 146, 152. And see also the opinion of *Ruggles, J.*, in *People v. Brooklyn*, 4 N. Y. 419, 424.



tained in a particular way. Such constitutions amount to a prohibition against taking money. In States whose constitutions do not require the compensation to be first made, the legislature might be justified in pressing emergencies in authorizing money to be taken.<sup>10</sup> In regard to choses in action, and all other kinds of personal property, there can be no doubt as to the power of appropriation. Claims of citizens against a foreign power,<sup>11</sup> or their goods and chattels,<sup>12</sup> may be taken by the national government for the purpose of adjusting its relations with such power. So a claim for damages to land by reason of an unlawful entry thereon may be taken and adjusted in a proceeding to take the land itself.<sup>13</sup> Shares of stock in a railroad company may be taken to enable a consolidation to be effected.<sup>14</sup> All contracts and rights secured thereby may be taken or impaired for the public use.<sup>15</sup>

§ 264. Public lands and lands held by grant from the State or condemning authority. —The public lands of the United States situated within a State and held for sale or settlement are subject to the eminent domain of the State.<sup>16</sup> But property of the United States devoted to the particular uses of the government, as for an armory,<sup>17</sup> or military

<sup>10</sup> In *Burnett v. Sacramento*, 12 Cal. 76, Field, J., expresses the opinion that the legislature cannot appropriate money.

<sup>11</sup> *Meade v. United States*, 2 Ct. of Claims, 224.

<sup>12</sup> *Jones v. Walker*, 2 Paine C. C. 688.

<sup>13</sup> *Morris Canal & Banking Co. v. Townsend*, 24 Barb. 658.

<sup>14</sup> *Black v. Del. & Raritan Canal Co.*, 24 N. J. Eq. 455; *Grigg v. Northern R. R. Co.*, 67 N. H. 452, 41 Atl. Rep. 271.

<sup>15</sup> *Cornwall v. L. & N. R. R. Co.*, 87 Ky. 72, 7 S. W. Rep. 553; *Matter of Opening First St.*, 66 Mich. 42, 33 N. W. Rep. 15; *Page v. Baltimore*, 34 Md. 558; *Matter*

*of New York etc. R. R. Co.*, 44 Hun 194; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 S. C. Rep. 718. In the last case it is said: "A contract is property, and, like any other property, may be taken under condemnation proceedings for public use."

<sup>16</sup> *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Hendricks v. Johnson*, 6 Porter. Ala. 472; *People v. District Court*, 11 Col. 147; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753.

<sup>17</sup> *United States v. Ames*, 1 W. & M. 76.

purposes, or public buildings<sup>18</sup> and over which jurisdiction has been ceded, cannot be taken by the State in which it lies.<sup>19</sup> A State may authorize property to be taken from its own grantee.<sup>20</sup> Such a taking does not impair the obligation of any contract, it being an implied condition of all grants by the State that the property conveyed shall be subject to the power of eminent domain.<sup>21</sup> So a city may take, for public uses, property which is held by grant from itself, and notwithstanding its covenant for quiet enjoyment.<sup>22</sup> The city of Boston covenanted with the owner of a wharf that it would not obstruct or in any manner interfere with the same. It was held that this covenant did not prevent the city from laying out a street over the wharf, that the power to establish streets was vested in the city for the benefit of the general public, and it could not abridge or bargain it away by contracts with individuals.<sup>23</sup> The State may condemn property which it occupies under a lease and notwithstanding a covenant to surrender possession of the premises at the expiration of the lease.<sup>24</sup> And generally the existence of contracts between the condemnor and the owner, respecting the property sought to be taken, will be no bar to the condemnation, although they may affect the amount of compensation.<sup>25</sup> "All contracts are subject to the power of eminent domain, whenever the public necessity requires its exercise, and must be regarded as made with reference thereto."<sup>26</sup>

<sup>18</sup> *United States v. Chicago*, 7 How. 185.

<sup>19</sup> For a construction of the act of March 3d, 1875, granting the right of way through public grounds, see *Red River & Lake of the Woods R. R. Co. v. Sture*, 32 Minn. 95.

<sup>20</sup> *Jackson v. Winn's Heirs*, 4 Littell, 322; *Young v. McKenzie*, 3 Ga. 31; *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige 45.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Brimmer v. Boston*, 102

Mass. 19; *Philadelphia etc. R. R. Co. v. Philadelphia*, 9 Phila. 563; And see *City of Albany v. Watervliet T. & P. Co.*, 108 N. Y. 14, 15 N. E. Rep. 370.

<sup>23</sup> *Brimmer v. Boston*, 102 Mass. 19.

<sup>24</sup> *Tait's Exr. v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. Rep. 697.

<sup>25</sup> *Southern Cotton Press & Mfg. Co. v. Galveston Wharf Co.*, 3 Tex. Civ. App. p. 309, §§ 256-258.

<sup>26</sup> *Matter of Opening First St.*,

§ 264a. **Lands of Indian tribes.**—It has been held that the lands of the Cherokee Nation are subject to the eminent domain power of the general government and that congress may authorize the condemnation of a railroad right of way through such lands.<sup>27</sup>

§ 265. **Property affected by contracts, settlements or otherwise, or held for particular uses, educational, charitable, or otherwise.**—Since all property is subject to the power of eminent domain, it matters not for what purpose it is held, nor how the title or use may be involved or restricted, nor what the estate or interest which any person has therein. The property of colleges or other educational institutions,<sup>28</sup> and land conveyed to trustees for an academy<sup>29</sup> are subject to the power. So is mortgaged property,<sup>30</sup> property inalienably settled upon a family by the legislature,<sup>31</sup> property in the hands of a receiver<sup>32</sup> or property in the possession of the party condemning by lease or otherwise.<sup>33</sup> Where a street is opened reserving in the proprietor certain wharfage rights, another proceeding

66 Mich. 42, 33 N. W. Rep. 15; Metropolitan City R. R. Co. v. Chicago West Div. R. R. Co., 87 Ill. 317. See also post, § 265.

<sup>27</sup> Cherokee Nation v. Southern Kansas R. R. Co., 135 U. S. 641, 10 S. C. Rep. 965, reversing 33 Fed. Rep. 900.

<sup>28</sup> In re St. Paul & Northern Pacific Ry. Co., 34 Minn. 227; Opening of Streets through Girard College Grounds, 10 Phila. 145; and see University of Minnesota v. St. Paul & Northern Pacific Ry. Co., 36 Minn. 447.

<sup>29</sup> Trustees of Belfast Academy v. Salmond, 11 Me. 109.

<sup>30</sup> Alabama & Florida R. R. Co. v. Kenney, 39 Ala. 307.

<sup>31</sup> In re Cuckfield Burial Board, 24 L. J. Ch. N. S. 585.

<sup>32</sup> Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq.

475; S. C. under title of National Dock Ry. Co. v. Central R. R. Co., 32 N. J. Eq. 755; Western Union Tel. Co. v. Atlantic & Pacific Tel. Co., 7 Biss. 367; City of Ft. Dodge v. Minneapolis etc. R. R. Co., 87 Ia. 389, 54 N. W. Rep. 243. But in such case leave should be obtained from the court appointing the receiver.

<sup>33</sup> Kip v. New York & Harlem R. R. Co., 6 Hun 24; S. C. 67 N. Y. 227; Coster v. New Jersey etc. R. R. Co., 24 N. J. L. 730; De Camp v. Hibernia Underground R. R. Co., 47 N. J. L. 43; Secomb v. Milwaukee etc. R. R. Co., 49 How. Pr. 75; Tait's Executor v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. Rep. 697; Jacksonville etc. R. R. Co. v. Adams, 28 Fla. 631, 10 So. Rep. 465.

may be instituted to condemn such rights.<sup>34</sup> Where the petitioner for a mill had been forever enjoined from causing the water, by means of his dam, or by any other means, to flow back into the tail-race of the defendant's mill or upon any part of his premises, it was held no bar to the proceeding to condemn a right of flowage, the purport of the injunction being merely to prevent an illegal flowing.<sup>35</sup> A judgment in ejectment against a party having the power of eminent domain is no bar to a condemnation of the property recovered in the ejectment suit.<sup>36</sup> The right secured by contract with a railroad company to have a particular crossing constructed can be condemned.<sup>37</sup> And generally the existence of contracts between the parties to the condemnation, respecting the land involved, do not affect the right to condemn.<sup>38</sup> An owner of land offered to give a right of way for a railroad provided the road should not encroach further upon his land than a certain designated line. The proposition was accepted, the fence moved back to the line and the road built. Subsequently the defendant acquired the right of way with notice of the agreement and the land became vested in the plaintiff. The defendant was proceeding to condemn additional land and thus to encroach in violation of the agreement, when the plaintiff filed a bill to enjoin. It was held that the right to take under the power of eminent domain could not be frustrated by any contracts between private parties, or between the condemnor and the owner of the land. It was

<sup>34</sup> Page v. Baltimore, 34 Md. 558.

<sup>35</sup> Peck v. Van Rensselaer, 8 Blackf. Ind. 312.

<sup>36</sup> Jacksonville etc. R. R. Co. v. Adams, 28 Fla. 631, 10 So. Rep. 465. And a judgment that certain property cannot be taken under a void ordinance is no bar to its condemnation under a subsequent valid ordinance. Ligare v. Chicago etc. R. R. Co., 166 Ill. 249, 46 N. E. Rep. 803.

<sup>37</sup> Matter of New York etc. R. R. Co., 44 Hun 194.

<sup>38</sup> Chicago etc. R. R. Co. v. Illinois Central R. R. Co., 113 Ill. 156; Matter of Opening First Street, 66 Mich. 42, 33 N. W. Rep. 15; City of Albany v. Watervliet T. & R. R. Co., 108 N. Y. 14, 15 N. E. Rep. 370; Southern Cotton Press & Mfg. Co. v. Galveston Wharf Co., 3 Tex. Civ. App. p. 309, §§ 256-258.

also held that the defendant could not destroy the agreement without paying for the land which was given in consideration of the agreement and that equity would enforce such payment.<sup>39</sup> The fact that the property of an individual or corporation is devoted to a use of a public nature for which the power of eminent domain might be exercised, does not prevent its being taken under a general authority, unless such individual or corporation is obliged by law to continue such use for the benefit of the public so long as it continues to use the property at all.<sup>40</sup>

**§ 266. Taking railroad property for highways and streets.**—A general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of a railroad.<sup>41</sup> It makes no difference that the rail-

<sup>39</sup> *Cornwall v. L. & N. R. R. Co.*, 87 Ky. 72, 7 S. W. Rep. 553; and see *Jones v. Pittsburgh etc. R. R. Co.*, 11 Pa. Supr. Ct. 202.

<sup>40</sup> *Matter of New York, Lackawanna & Western Ry. Co.*, 99 N. Y. 12, 24. The court say: "If the law of its existence does not prevent it from being a mere private corporation, from disregarding if it pleases all public uses; if it may abandon its business at any moment and refuse to run its propellers and sell its lands by an absolute title without responsibility to the sovereign, which is permitted by its charter (§ 2); i. e. short, if under that charter it may be a purely private corporation, its property is not so held as to be exempt from a taking under the law of eminent domain. Any other rule would be surrounded with difficulties. If the test should be made that of the actual use, of the character of the business done and the benefit to the public realized, we shall never know

where to draw the line, and must equally exempt individuals whose property is thus used; and in every case an uncertain and shifting question of fact would dominate the decision to be rendered."

<sup>41</sup> *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *Hannibal v. Hannibal & St. Joseph R. R. Co.*, 49 Mo. 480; *St. Paul etc. Ry. Co. v. Minneapolis*, 35 Minn. 141; *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345; *Illinois Cent. R. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. Rep. 740; *Lake Shore & M. S. R. R. Co. v. Chicago*, 148 Ill. 509, 37 N. E. Rep. 88; *Lake Shore & M. S. R. R. Co. v. Chicago*, 151 Ill. 359, 37 N. E. Rep. 880; *Chicago & N. W. R. R. Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. Rep. 574; *Chicago & N. W. R. R. Co. v. Town of Cicero*, 155 Ill. 51, 39 N. E. Rep. 577; *Lake Erie & W. R. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. Rep. 780; *Ft. Wayne v. Lake Shore etc. R. R. Co.*, 132

road company owns its right of way in fee.<sup>42</sup> An authority to lay out a highway across the *track* of a railroad company is authority to cross all the tracks at any place.<sup>43</sup> But under a general authority to lay out highways, a part of the right of way of a railroad cannot be taken longitudinally,<sup>44</sup> nor can the way be laid through depot buildings and grounds,<sup>45</sup> shops,<sup>46</sup> and the like, which are devoted to special uses in connection with the road and necessary to its

Ind. 558, 32 N. E. Rep. 215; Powell v. Greensburg, 150 Ind. 148; Old Colony R. R. Co. v. Fall River, 147 Mass. 455; Commissioners of Parks v. Michigan Cent. R. R. Co., 90 Mich. 385, 51 N. W. Rep. 447. But a highway may not be so located as to take the abutment of a bridge. Williamsport etc. R. R. Co. v. Supervisors, 4 Pa. Co. Ct. 588.

<sup>42</sup> Chicago etc. R. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. Rep. 78.

<sup>43</sup> Albany Northern R. R. Co. v. Brownell, 24 N. Y. 345. But not to go through yards. Rochester etc. R. R. Co. v. Rochester, 17 App. Div. N. Y. 257.

<sup>44</sup> New Jersey & Southern R. R. Co. v. Long Branch Comrs. 39 N. J. L. 28; Bridgeport v. New York & New Haven R. R. Co., 36 Conn. 255; City of Seymour v. Jeffersonville etc. R. R. Co., 126 Ind. 466, 26 N. E. Rep. 188; Union Pac. R. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. Rep. 112.

<sup>45</sup> St. Paul Union Dep. & Co. v. St. Paul, 30 Minn. 359; Milwaukee & St. Paul Ry. Co. v. Fairbault, 23 Minn. 167; Prospect Park & Coney Island R. R. Co. v. Williamson, 91 N. Y. 552; City of Valparaiso v. Chicago etc. R. R. Co., 123 Ind. 467, 24 N. E.

Rep. 249; Cincinnati etc. R. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17; Manhattan R. R. Co. v. New York, 89 Hun 429, 35 N. Y. Supp. 505; Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. Rep. 1077; City Council v. Georgia etc. R. R. Co., 98 Ga. 161; Chicago etc. R. R. Co. v. Starkweather, 97 Ia. 159, 66 N. W. Rep. 87; Rochester etc. R. R. Co. v. Rochester, 17 App. Div. 257. Compare Matter of Folts St., 18 App. Div. N. Y. 568; New York etc. R. R. Co. v. Paterson, 61 N. J. L. 408, 39 Atl. 680; People v. New York Central etc. R. R. Co., 156 N. Y. 570. A contrary doctrine appears to be held in Chicago, Rock Island & Pacific R. R. Co. v. Town of Lake, 71 Ill. 333; Philadelphia etc. R. R. Co. v. Philadelphia, 9 Phila. 563. In the former case it was held that, under the general authority to lay out streets, one could be laid out through a block of ground used for depots, switch tracks, freight houses, etc. It did not appear, however, that the street would take any part of any building.

<sup>46</sup> Atlanta v. Central R. R. Co., 53 Ga. 120.

operation and in constant use in connection therewith, and which would be materially impaired or destroyed by the taking. But the rule must receive a reasonable application and a slight interference with the platform of a depot will not prevent the establishment of a highway.<sup>47</sup> Nor will it prevent opening a street through station grounds in a country village which extend for 3,200 feet along the right of way, without an intersecting street,<sup>48</sup> nor across yards occupied by tracks and used merely for storing cars.<sup>49</sup> Under a statute which provided that, if a turnpike or way should be laid out over a railroad, "the said turnpike or way may be so made as to pass over or under said railroad, and said turnpike or way shall in all cases be so made as not to obstruct or injure such railroad," it was held that a crossing at grade could not be made, but that the highway must be carried under the railroad or over it by a bridge.<sup>50</sup> A statute provided as follows: "When a new way or road

<sup>47</sup>New York & Long Branch R. R. Co. v. Drummond, 46 N. J. L. 644. The fact that the opening will take a house on the right of way belonging to the company and occupied by the section foreman, is no objection, since the house need not necessarily occupy that location and is not a necessary appurtenance of the road. Illinois Central R. R. Co. v. Normal, 175 Ill. 562.

<sup>48</sup>Battle Creek etc. R. R. Co. v. Tiffany, 99 Mich. 471, 58 N. W. Rep. 617. It was held no objection that the street would interfere with cattle yards which might be avoided by a jog of 22 feet. The court says: "Chapter 29 should, in our opinion, be construed as confirming the power to lay highways across village depot grounds, except where its concurrent use will be impossible or attended by serious incon-

venience to the railroad. To defeat the public right the railroad company should clearly prove its intention to so use the land as to show its good faith and the incompatibility of the two uses." And see Grand Rapids v. Grand Rapids etc. R. R. Co., 58 Mich. 641.

<sup>49</sup>Illinois Central R. R. Co. v. Chicago, 141 Ill. 586, 30 N. E. Rep. 1044; Chicago & N. W. R. R. Co. v. City of Chicago, 151 Ill. 348, 37 N. E. Rep. 842; Illinois Central R. R. Co. v. Chicago, 156 Ill. 98, 41 N. E. Rep. 45; Commissioners of Parks v. Detroit etc. R. R. Co., 93 Mich. 58, 52 N. W. Rep. 1083; Chicago etc. R. R. Co. v. Pontiac, 169 Ill. 155.

<sup>50</sup>Boston & Maine R. R. Co. v. Lawrence, 2 Allen 107; Central Vt. R. R. Co. v. Royalton, 58 Vt. 234.

is opened or made across a way or road already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road." It was held that a street across a railroad must be carried over by a viaduct.<sup>51</sup> An ordinance to extend a street across the main and side tracks of a railroad company is not so unreasonable and oppressive as to be void, merely because the proposed crossing is between two parallel streets which cross the tracks and are only 620 feet apart.<sup>52</sup>

§ 267. To what extent one railway company may take the property of another. —The general authority to locate and construct a railroad from one point to another does not authorize the taking of property already devoted to railroad uses.<sup>53</sup> In one of the cases cited the court says:

<sup>51</sup> Northern Central Ry. Co. v. Baltimore, 46 Md. 425. As to the duty of constructing the crossing and the manner of crossing, see Smith v. New Haven, 59 Conn. 203, 22 Atl. Rep. 146; New York etc. R. R. Co. v. City of Waterbury, 60 Conn. 1, 22 Atl. Rep. 439; Chicago & N. W. R. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. Rep. 1109, 4 Am. R. R. & Corp. Rep. 697; Ft. Dodge v. Minneapolis etc. R. R. Co., 87 Ia. 389, 54 N. W. Rep. 243; Bucholz v. New York etc. R. R. Co., 66 Hun 377, 21 N. Y. Supp. 503; Bishop v. Ranney, 59 Vt. 316.

<sup>52</sup> Chicago etc. R. R. Co. v. Town of Cicero, 154 Ill. 656, 39 N. E. Rep. 574. Compare Winona etc. R. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. Rep. 1077.

<sup>53</sup> Housatonic etc. R. R. Co. v. Lee & Hudson R. R. Co., 113 Mass. 391; Worcester & Nashua R. R. Co. v. Railroad Comrs., 118 Mass. 561; Boston & Maine R. R. Co. v. Lowell & Lawrence R. R. Co., 124 Mass. 363; Alex-

andria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co., 75 Va. 780; Oregon Cascade R. R. Co. v. Bailey, 3 Or. 164; Mobile etc. R. R. Co. v. Ala. Midland R. R. Co., 87 Ala. 501, 6 So. Rep. 404; Hoke v. Georgia R. & B. Co., 89 Ga. 215, 15 S. E. Rep. 124; Illinois Central R. R. Co. v. Chicago etc. R. R. Co., 122 Ill. 473; Appeal of Pittsburgh Junction R. R. Co., 122 Pa. St. 511, 16 Atl. Rep. 564; Appeal of Sharon R. R. Co., 122 Pa. St. 533, 17 Atl. Rep. 234; Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150; Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co., 8 Pa. Co. Ct. 10; In re Providence etc. R. R. Co., 17 R. I. 324, 21 Atl. Rep. 965; Barre R. R. Co. v. Montpelier R. R. Co., 61 Vt. 1, 17 Atl. Rep. 923; Lake Shore etc. R. R. Co. v. New York etc. R. R. Co., 8 Fed. Rep. 858; Chattanooga etc. R. R. Co. v. Felton, 69 Fed. Rep. 273; Dublin etc. R. R. Co. v. Navan etc. R. R. Co., 5 Irish Eq. Rep. 393; Pennsyl-



"A charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation, as provided by the general laws, does not prima facie give any power to lay out the road over land already devoted to, and within the recorded location of, another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication. And such implication can only be found in the language of the act, or from the application of the act to the subject matter, so that the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line."<sup>54</sup> The legislature may authorize one railroad to take the property of another, and, as indicated in the opinion just quoted, this may be done by express words,<sup>55</sup> or by necessary implication.<sup>56</sup> These general rules are undoubted but their application to particular cases is often attended with much difficulty, as will appear from the following sections. But no difficulty can arise when authority is given in express words to take particular property. The power of the legislature is plenary and it is only necessary to observe the usual requirements as to compensation and procedure.

vania S. V. R. R. Co. v. Philadelphia etc. R. R. Co., 160 Pa. St. 232, 28 Atl. Rep. 771. Contra: Costa R. R. Co. v. Moss, 23 Cal. 323; California Pacific R. R. Co. v. Central Pacific R. R. Co., 47 Cal. 549.

<sup>54</sup> Housatonic etc. R. R. Co. v. Lee & H. R. R. Co., 118 Mass. 391.

<sup>55</sup> Eastern R. R. Co. v. Boston & Maine R. R. Co., 111 Mass. 125; Lewis v. Germantown etc. R. R. Co., 16 Phila. 621; St. Louis etc. R. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. Rep. 483.

<sup>56</sup> Mobile etc. R. R. Co. v. Ala. Midland R. R. Co., 87 Ala. 501, 6 So. Rep. 404; Matter of City of Buffalo, 68 N. Y. 167; Providence & Worcester R. R. Co. v. Norwich & Worcester R. R. Co., 133 Mass. 277: "Where it appears by statute, or by the application of the statute to the subject matter, that the contemplated road cannot reasonably be built without appropriating land already devoted to public use, an implication arises that the legislature intended that such appropriation might be made."

The difficulty arises in determining whether one railroad company has been authorized by implication to take the property of another. As preliminary to the discussion of this question it may be said that the general rule above stated does not apply to prevent one railroad taking the property of another, which is not in use for railroad purposes and not necessary to the proper exercise of the corporate franchises.<sup>57</sup> In any case it is immaterial how the first company acquired the property sought to be taken, whether by condemnation or by purchase.<sup>58</sup>

§ 267a. Same: Taking tracks or joint use of same.—It would seem clear that, under the general rule already stated, nothing but an express authority or an absolute necessity created by the legislature itself, would justify one railroad company in taking the tracks of another company, or even the joint use of such tracks.<sup>59</sup> Such a necessity could not arise under general incorporation laws where the incorporators make the location. The cases cited above are the only ones we are aware of in which an attempt has been made to condemn the joint use of tracks, under a general authority. In the Minnesota case it appeared that the St. Louis Railroad Company, under a license from a mill company, which owned the land, constructed branch tracks on a thirty-foot strip of land, which connected with tracks on a trestle belonging to the mill com-

<sup>57</sup> Baltimore & Ohio R. R. Co. v. P. W. & K. R. R. Co., 17 W. Va. 812; Peoria, Pekin & Jacksonville R. R. Co. v. Peoria & Springfield R. R. Co., 66 Ill. 174; Colorado Eastern R. R. Co. v. Union Pac. R. R. Co., 41 Fed. Rep. 293; Pennsylvania R. R. Co.'s Appeal, 3 Walker's Pa. Supm. Ct. 454; Matter of Rochester etc. R. R. Co., 110 N. Y. 119, 17 N. E. Rep. 678; Southern Pacific R. R. Co. v. Southern Cal. R. R. Co., 111 Cal. 221, 43 Pac. Rep. 602; St. Louis etc. R. R. Co. v. Belleville City R. R. Co., 158

Ill. 390, 41 N. E. Rep. 916; Orleans etc. R. R. Co. v. Jefferson etc. R. R. Co., 51 La. An. 1605.

<sup>58</sup> In re Providence & W. R. R. Co., 17 R. I. 324, 21 Atl. Rep. 965.

<sup>59</sup> Minneapolis & St. Louis, R. R. Co. v. Minneapolis & W. R. R. Co., 61 Minn. 502, 63 N. W. Rep. 1035; Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523; post, § 267d. And see Union Pass. R. R. Co. v. Continental R. R. Co., 11 Phil. 321; Philadelphia etc. R. R. Co.'s Appeal, 187 Pa. St. 123.

pany, the whole affording access to certain mills and elevators. The St. Louis Railroad Company operated their tracks for some twenty years, without any other right than that of a license, when the mill company deeded the premises to the Western Railroad Company for railroad purposes. The latter company brought ejectment against the St. Louis Company, and the title of the former having been confirmed, the St. Louis Company sought to condemn the joint use of the thirty-three foot strip and also of the trestle tracks. The right was denied and the decision was placed upon the general rule above stated as well as upon the provision of a special statute.<sup>60</sup> In the Illinois case the attempt was made by one horse railroad company to condemn the joint use of the tracks of another such company for a distance of three blocks, and the right was denied on similar grounds. Of course the legislature may empower one railroad company to condemn the use of the tracks of another company, and this has been done in some cases.<sup>61</sup>

§ 267b. Same: Taking part of right of way.—A statute of Massachusetts provided for the establishment of a union

<sup>60</sup> The court says: "We think that the rule is well established that when property has already been appropriated for public use in the lawful and proper exercise of the power of eminent domain it cannot be taken for another public use which will thereby wholly, or to any great extent in part, defeat the former use, unless the power to make such second appropriation is expressly granted, or arises from necessary implication. *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359; 15 N. W. Rep. 684. There may be instances where public necessity is of such a nature that one railroad company might be empowered to condemn and appropriate the property of another, but it would require a

legislative enactment to authorize such a proceeding. If one railroad could, at its option, condemn the property of another railroad company, we do not see why such proceedings could not be continued as often as each different company desired. The law of eminent domain does not sanction any such absurdity, especially where the public use sought is identical with the one already enjoyed." *Minneapolis & St. L. R. R. Co. v. Minneapolis & W. R. R. Co.*, 61 Minn. 502, 63 N. W. Rep. 1035.

<sup>61</sup> *Sixth Avenue R. R. Co. v. Kerr*, 45 Barb. 138; *S. C.* 72 N. Y. 330; *Pennsylvania R. R. Co. v. Baltimore & Ohio R. R. Co.*, 60 Md. 263; *Toledo Consolidated St. R. R. Co. v. Toledo Electric St.*

passenger station at Worcester for the joint use of all the railroads entering the city. It authorized the different companies to change and extend the location of their tracks so as to reach the new station, but did not define the locations to be occupied. It was shown that it was not feasible for the Norwich and Worcester Railway Company to reach the new station without taking a part of the right of way of the Providence and Worcester Railway Company, and it was held that the act conferred, by necessary implication, the right to do so.<sup>62</sup> The court says: "It is well settled, as the general rule, that a right conferred by the legislature to build or extend and maintain a railway between certain termini does not, *prima facie*, give the power to lay out such railroad over land already devoted to a like public use by the location of another railroad or highway. But it is an equally well settled qualification of the rule, that when it appears by the statute, or by the application of the statute to the subject-matter, that the contemplated road cannot reasonably be built without appropriating land already devoted to public use, an implication arises that the legislature intended that such appropriation might be made."<sup>63</sup> In this and in many similar cases, where the authority was given by special act, the location of the proposed railroad was more or less completely defined by the legislature. In such cases, if in carrying out the power so expressly given, it becomes reasonably necessary to take property already devoted to public use, there is a necessary implication that the legislature so intended. The necessity for the taking is created directly by the legislature itself. But in case of railroad companies organized under general laws,

R. R. Co., 50 Ohio St. 603, 36 N. E. Rep. 312, S. C. 6 Ohio C. C. 362.

<sup>62</sup> Providence & W. R. R. Co. v. Norwich & W. R. R. Co., 138 Mass. 277.

<sup>63</sup>To same effect: Springfield v. Conn. Riv. R. R. Co., 4 Cush. 63. One railroad company may take part of the right of way of

another when it shows a reasonable necessity therefor and when the taking will not unreasonably impair the rights of the other company. South & North Ala. R. R. Co. v. Highland Ave. etc. R. R. Co., 119 Ala. 105, 24 So. Rep. 114; Shreveport etc. R. R. Co. v. St. Louis etc. R. R. Co., 51 La. An. 814, 25 So. Rep. 424.

which select their own location, no such necessity arises, or it arises only to a very limited extent. Thus it has been held that a corporation organized under the general railroad laws of Illinois could not locate and construct its road on the bottom lands of the Mississippi river, between the bluff and the river bank, so as to necessitate taking a part of the right of way of the defendant, though such right of way occupied the entire width of bottom land at the point in question and was from one to two hundred feet wide, and the petitioner would otherwise have to abandon its location in the bottom lands.<sup>64</sup> It is manifest, however, that even a

<sup>64</sup> *Illinois Cent. R. R. Co. v. Chicago etc. R. R. Co.*, 122 Ill. 473. The New York Court of Appeals, in *Matter of City of Buffalo*, 68 N. Y. 167, 173, 174, says: "So, if the legislature should give power by special charter to a railroad corporation to build a railroad from Albany to Utica, along the banks of the Mohawk, and to pass through Little Falls, with power conferred in general terms to take and hold all land needful therefor, we should of necessity imply that power was given to take so much of a public highway already laid out in the narrow space through which that river runs at the last-named place, as was needful to construct the railway track. Here the implication would arise, from the application of the special charter to the subject-matter of it, as by reasonable intendment, the railway track could not be laid on any other line. But if a railroad corporation should organize under the General Railroad Acts, in general terms, to build a railway from Albany to Utica, would there be a necessary implication from the gen-

eral gift of power in these acts to take lands, that such corporation could appropriate the town highway, or State canal, or track of the New York Central Railroad Company, already existing in the narrow rocky ravine at Little Falls? And yet, it might be made quite plain by testimony that a railroad could not be built through that gorge, without taking the place there of one of those existing public works. And the reason for the two different results is, that in the first instance it might be presumed from the time and special nature and object of the enactment, that the legislative attention was especially called to the state of things existing on the banks of the Mohawk; and that the power to lay a railway track there was given in full consideration of what would be the result of so laying one, and of what would need to be done therefor, and that as a probable consequence, some public use already there would have to yield to the new use; but in the second instance it is hardly necessary to say that such a

railroad company which is organized under a general law, may show a reasonable necessity for taking part of the right of way of another road, as when it is located through a town in which another road has been previously built, and the topography or other conditions are such that the new road cannot reasonably be located so as to accommodate the public and accomplish the object in view without either encroaching on the right of way of another company, or incurring ruinous, or greatly increased expense.<sup>65</sup> The same necessity may arise in mountainous countries, or else the first company might preclude all others from reaching certain localities.<sup>66</sup> But this implied authority only extends to the taking of so much of the right of way of the first company as can be spared without material detriment. The question is, "Whether the new condemnation can be made without destroying the use and usefulness of that

presumption would have not the slightest ground."

<sup>65</sup> *Mobile & G. R. R. Co. v. Alabama Midland R. R. Co.*, 87 Ala. 501, 6 So. Rep. 404; *Mobile & G. R. R. Co. v. Alabama Midland R. R. Co.*, 87 Ala. 520, 6 So. Rep. 437. And see *Anniston etc. R. R. Co. v. Jacksonville etc. R. R. Co.*, 82 Ala. 297, 2 So. Rep. 641; *East & West R. R. Co. v. East. Tenn. etc. R. R. Co.*, 75 Ala. 275.

<sup>66</sup> *Butte etc. R. R. Co. v. Montana U. R. Co.*, 16 Mon. 504, 41 Pac. Rep. 232. After an elaborate discussion and review of authorities, the court concludes as follows: "To conclude, we adopt that construction which is more jealously careful of the best interests of the State, and say that, where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary

to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and in doing so is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and withal would be obliged by the topography of the mountains to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated."

part of the first-acquired right of way which is in actual use, or so obstructing or hindering or embarrassing it as to render it unsafe."<sup>67</sup> Just what the degree of necessity must be to justify the taking it is difficult to say. One company cannot take part of the right of way of another merely because it is more convenient.<sup>68</sup> It is largely a question of practicability and expense, of comparative advantage and injury, having regard always to the interests of the public, for whose benefit the general authority is given and the particular taking proposed.<sup>69</sup> If no reasonable or sufficient necessity is shown the taking must be denied under the general rule.<sup>70</sup>

**§ 267c. Same: Taking land used for depots, yards, shops and other appurtenances.**—Under a general authority one railroad company cannot build through the yards of an-

<sup>67</sup> *Mobile & G. R. R. Co. v. Ala. Midland R. R. Co.*, 87 Ala. 520, 6 So. Rep. 407.

<sup>68</sup> *Barre R. R. Co. v. Montpelier R. R. Co.*, 61 Vt. 1, 17 Atl. Rcp. 923.

<sup>69</sup> *Mobile & G. R. R. Co. v. Ala. Midland R. R. Co.*, 87 Ala. 501, 6 So. Rep. 404.

<sup>70</sup> *Hoke v. Georgia R. & B. Co.*, 89 Ga. 215, 15 S. E. Rep. 124; *Richmond & D. R. R. Co. v. Durham & N. R. R. Co.*, 104 N. C. 658, 10 S. E. Rep. 659; *Raleigh & W. R. R. Co. v. Glendon etc. Co.*, 112 N. C. 661, 17 S. E. Rep. 77; *Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co.*, 8 Pa. Co. Ct. 10; *Pennsylvania S. V. R. R. Co. v. Schuylkill Nav. Co.*, 167 Pa. St. 576, 31 Atl. Rep. 858; *Lake Shore etc. R. R. Co. v. New York etc. R. R. Co.*, 8 Fed. Rep. 858; *Cincinnati etc. R. R. Co. v. Danville etc. R. R. Co.*, 75 Ill. 113; *Lewis v. Germantown etc. R. R. Co.* 16 Phil. 621.

Where the statute authorized the taking of any real estate, franchise or easement of any corporation, the taking by one railroad of part of the right of way of another not occupied by tracks was sustained, with remarks by the court which go much beyond the necessities of the case. *Northern R. R. Co. v. Concord & Claremount R. R. Co.*, 27 N. H. 183. So, where one company owned land abutting on a street, the fee extending to the middle of the street, it was held that another company having authority to occupy the street would not be prevented from doing so by the fee being in the first company. *Philadelphia etc. R. R. Co. v. Pennsylvania etc. R. R. Co.*, 16 Phila. 636. The general question of the section is discussed but not decided in *Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co.*, 116 Ind. 578, 19 N. E. Rep. 440.

other,<sup>71</sup> or take its depot or other appurtenances necessary to the transaction of its business. But one company may construct an elevated railroad through the least valuable part of an extensive railroad yard, when only a trifle of land is taken for supports and the structure is so built as to be no material interference to the business of the defendant and the plaintiff cannot reach its terminus by any other route.<sup>72</sup> So where a tract of land was acquired and used for union depot purposes, it was held that another company could take fifty feet from one side which was cut off from the main body by a creek and the tracks of another company and which was unused and incapable of being safely used in connection with the rest of the property.<sup>73</sup> Land owned by a street railroad company and used as a horse barn and salt warehouse may be condemned by an elevated railroad company for its right of way.<sup>74</sup> The general rule will not be applied to prevent the taking of a small and immaterial part of some of the appurtenances of one railroad company, when the taking is necessary for the right of way of another company or other imperative use.<sup>75</sup>

§ 267d. **Same: Joint use of tracks.**—Questions as to joint use of tracks have arisen mainly with respect to street railways. A power to provide for such joint use is undoubtedly essential to the public good.<sup>76</sup> It has been intimated that this may be done under the police power.<sup>77</sup> But property

<sup>71</sup> Appeal of Pittsburgh Junction R. R. Co., 122 Pa. St. 511, 16 Atl. Rep. 564; Appeal of the Sharon R. R. Co., 122 Pa. St. 533, 17 Atl. Rep. 234; Pennsylvania R. R. Co.'s Appeal, 80 Pa. St. 265.

<sup>72</sup> Pittsburgh Junction R. R. Co. v. Allegheny Valley R. R. Co., 146 Pa. St. 297, 23 Atl. Rep. 513.

<sup>73</sup> St. Louis etc. R. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. Rep. 483.

<sup>74</sup> Chicago W. D. R. R. Co. v. Metropolitan W. S. El. R. R. Co.,

152 Ill. 519, 38 N. E. Rep. 736.

<sup>75</sup> Chicago & North Western Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ill. 589; New York, Housatonic & Northern R. R. Co. v. Boston, Hartford & Erie R. R. Co., 36 Conn. 196; North Carolina Railroad Company v. Carolina Central R. R. Co., 83 N. C. 489.

<sup>76</sup> Covington St. R. R. Co. v. Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. Law. Reg. (N. S.) 765.

<sup>77</sup> Booth St. Ry. Law, §§ 110, 115; Covington St. R. R. Co. v.



cannot be taken from the owner and devoted to a public use under the police power.<sup>78</sup> Some cases seem to refer the power to provide for the joint use of tracks to the reserved power to repeal, alter or amend the charters of railroad companies.<sup>79</sup> But power to alter, amend or repeal a charter does not confer authority to deprive a corporation of its property or destroy its vested rights.<sup>80</sup> It is clear that the tracks and franchises of a street railroad company, as well as of any other railroad company, are property within the protection of the constitution.<sup>81</sup> It is also clear that to take the use of property is to take property within the meaning of the constitution.<sup>82</sup> It follows that one company cannot be authorized to take the joint use of another's tracks, except by an exercise of the eminent domain power. All the cases practically concede this by holding that compensation must be made.<sup>83</sup> But such condemnation can-

Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. Law. Reg. (N. S.) 765; Canal & C. St. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 So. Rep. 849; Pacific R. R. Co. v. Wade, 91 Cal. 449, 27 Pac. Rep. 768; Union Depot R. R. Co. v. Southern R. R. Co., 105 Mo. 562, 4 Am. R. R. & Corp. Rep. 622.

<sup>78</sup> Ante §§ 156 et seq.

<sup>79</sup> Metropolitan R. R. Co. v. Quincy R. R. Co., 12 Allen 262; Metropolitan R. R. Co. v. Broadway R. R. Co., 99 Mass. 238; Metropolitan R. R. Co. v. Highland R. R. Co., 118 Mass. 290; Cambridge R. R. Co. v. Charles River St. R. R. Co., 139 Mass. 454; New Bedford R. R. Co. v. Acushnet R. R. Co., 143 Mass. 200.

<sup>80</sup> People v. O'Brien, 111 N. Y. 1, 48-50.

<sup>81</sup> Ante, § 141b.

<sup>82</sup> Ante, §§ 144, 144a.

<sup>83</sup> Covington St. R. R. Co. v.

Covington & Cinn. St. R. R. Co. (Ky.), 19 Am. Law Reg. (N. S.) 765; Louisville City R. R. Co. v. Central Pass. R. R. Co., 87 Ky. 223, 8 S. W. Rep. 829; Canal & C. St. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 So. Rep. 849; Canal & C. R. R. Co. v. Orleans R. R. Co., 44 La. An. 54, 10 So. Rep. 389; Canal & C. R. R. Co. v. St. Charles St. R. R. Co., 44 La. An. 1069, 11 So. Rep. 702; Canal & C. R. R. Co. v. Crescent City R. R. Co., 44 La. An. 485, 10 So. Rep. 888; New Orleans & C. R. R. Co. v. Canal & C. R. R. Co., 47 La. An. 1476, 17 So. Rep. 834, 12 Am. R. R. & Corp. Rep. 590; Pennsylvania R. R. Co. v. Baltimore & O. R. R. Co., 63 Md. 263; North Baltimore Pass. R. R. Co. v. North Ave. R. R. Co., 75 Md. 233, 23 Atl. Rep. 466; Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550; S. C. 20 N. J. Eq. 61; Sixth Ave. R.

not be made under a general power to take property.<sup>84</sup> A municipal corporation cannot grant to one company the right to use the tracks of another company, or authorize the condemnation of such use, without express authority to do so.<sup>85</sup> A municipal corporation having control of the matter of laying down tracks in its streets and the right to grant or refuse a permit so to use the streets, may, doubtless, in granting such right, reserve the power to provide for the joint use of tracks so laid by another company.<sup>86</sup> In most cases which have arisen, relating to the joint use of tracks, the right to provide for such joint use was derived from an express reservation or stipulation in the grant under which the tracks were laid, or from general laws providing for such joint use, in force when the grant was made, and to which the grant was, therefore, subject.<sup>87</sup> In such

R. Co. v. Kerr, 72 N. Y. 330; Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 138; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239; Toledo Consol. St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. Rep. 312; S. C. 6 Ohio C. C. 362; Union Pass. R. R. Co. v. Continental R. R. Co., 11 Phila. 321; 2 Dill. Munic. Corp. §727; Chicago General R. R. Co. v. Chicago City R. R. Co., 62 Ill. App. 502.

<sup>84</sup> Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523; ante, § 267 et seq.

<sup>85</sup> People v. Barnard, 48 Hun 57; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523; Chicago General R. R. Co. v. Chicago City R. R. Co., 10 Nat. Corp. Rep. 651; Booth Street Ry. Law, § 110.

<sup>86</sup> Louisville City R. R. Co. v. Central Pass R. R. Co., 87 Ky. 223, 8 S. W. Rep. 329; Canal & Claiborne Sts. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 South. Rep. 849; Canal & Claiborne R. R. Co. v. Orleans R. R. Co., 44 La. An. 54, 11 South. Rep. 702; North Baltimore Pass R. R. Co. v. North Ave. R. R. Co., 75 Md. 233, 23 Atl. Rep. 466; Jersey City & Hoboken Horse R. R. Co. v. Jersey City & Bergen R. R. Co., 21 N. J. Eq. 550; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239. Compare Ogden City R. R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. Rep. 288; Henderson v. Ogden City R. R. Co., 7 Utah, 199, 26 Pac. Rep. 286; People v. Barnard, 110 N. Y. 548, 18 N. E. Rep. 354; Citizens' Horse R. R. Co. v. City of Belleville, 47 Ill. App. 388.

<sup>87</sup> Pacific R. R. Co. v. Wade, 91 Cal. 449, 27 Pac. Rep. 768; Louisville City R. R. Co. v. Cen-

cases the reserved power may be exercised and the joint use provided for in accordance therewith and this would not be an exercise of the eminent domain power, but merely of a contract right.<sup>88</sup> Where the right to a joint use of tracks exists, equity has jurisdiction to settle the rights of the parties in case of disagreement in the exercise of their respective rights, whether such disagreement relates to the use of the tracks or to their repair and reconstruction.<sup>89</sup> The right of one company to straddle the tracks of another would doubtless stand upon the same footing as the right to a joint use of tracks.<sup>90</sup>

tral Pass. R. R. Co., 87 Ky. 233, 8 S. W. Rep. 329; Canal & C. St. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 South. Rep. 849; Canal & C. R. R. Co. v. Orleans R. R. Co., 44 La. An. 54, 10 South. Rep. 389; Canal & Claiborne R. R. Co. v. St. Charles St. R. R. Co., 44 La. An. 1009, 11 South. Rep. 702; Canal & Claiborne R. R. Co. v. Crescent City R. R. Co., 44 La. An. 485, 10 South. Rep. 888; New Orleans & C. R. R. Co. v. Canal & C. R. R. Co., 47 La. An. 1476, 17 South. Rep. 834, 12 Am. R. R. & Corp. Rep. 590; North Baltimore Pass. R. R. Co. v. North Ave. R. R. Co., 75 Md. 233, 23 Atl. Rep. 466; Union Depot R. R. Co. v. Southern R. R. Co., 105 Mo. 562, 4 Am. R. R. & Corp. Rep. 622; Jersey City & Hoboken Horse R. R. Co. v. Jersey & Bergen R. R. Co., 21 N. J. Eq. 550; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239; Toledo Consolidated St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. Rep. 312; S. C., 6 Ohio C. C. 362; Second & Third Sts. Pass. R. R. Co. v. Green & Coates Sts. Pass. R. R. Co., 3

Phila. 430; Grand Ave. R. R. Co. v. Lindell R. R. Co., 148 Mo. 637, 50 S. W. Rep. 302; Grand Ave. R. R. Co. v. Citizens' R. R. Co., 148 Mo. 665, 50 S. W. Rep. 305; Staten Island M. R. R. Co. v. Staten Island Elec. R. R. Co., 34 N. Y. App. Div. 181.

<sup>88</sup> Ibid.

<sup>89</sup> New Orleans & C. R. R. Co. v. Canal & C. R. R. Co., 47 La. An. 1476, 17 So. Rep. 834, 12 Am. R. R. & Corp. Rep. 590; North Baltimore Pass. R. R. Co. v. North Ave. R. R. Co., 75 Md. 233, 23 Atl. Rep. 466; Canal & C. R. R. Co. v. Crescent City R. R. Co., 44 La. An. 485, 10 So. Rep. 888.

The following additional cases bearing on the subject matter of the section are referred to: People's Pass. R. R. Co. v. Union Pass. R. R. Co., 15 Pa. Co. Ct. 498; Louisville etc. R. R. Co. v. Mississippi T. R. R. Co., 92 Tenn. 681, 22 S. W. Rep. 920; Chicago etc. R. R. Co. v. Kansas City etc. R. R. Co., 38 Fed. Rep. 58.

<sup>90</sup> Highland Ave. etc. R. R. Co. v. Birmingham Union R. R. Co., 117 Ala. 511, 23 So. Rep. 785; South Side Pass. R. R. Co. v. Second Ave. Pass. R. R. Co., 191

§ 268. **Same: Railroad crossings.**—The general rule does not operate to prevent one railroad crossing the right of way of another under general authority to build its road.<sup>91</sup> It is manifest that if this could not be done, then a general authority to locate and construct new railroads would be nugatory. Railroads chartered by the federal government stand on the same footing as those chartered by the State in this respect.<sup>92</sup> On the same principle one horse railroad may cross the tracks of another,<sup>93</sup> and a steam railroad may cross the tracks of a horse railroad company,<sup>94</sup> and vice versa.<sup>95</sup> Where one railroad granted

Pa. St. 492, 43 Atl. 346; Union Pass. R. R. Co. v. Continental Pass. R. R. Co., 11 Phila. 321.

<sup>91</sup> St. Louis, Jacksonville & Chicago R. R. Co. v. Springfield & Northwestern R. R. Co., 96 Ill. 274; Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co., 97 Ill. 506; East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co., 108 Ill. 265; New Castle & Richmond R. R. Co. v. Peru & Indianapolis R. R. Co., 3 Ind. 464; Grand Rapids, Newaygo & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R. Co., 35 Mich. 265; Morris & Essex R. R. Co. v. Central R. R. Co. 31 N. J. L. 205; Matter of Boston H. T. & W. Ry. Co., 79 N. Y. 64; Matter of Same R. R. Co., 79 N. Y. 69; Railway v. Railway, 30 Ohio St. 604; South Carolina R. Co. v. Columbia etc. R. R. Co., 13 Rich. Eq. S. C. 339; Lake Shore etc. R. R. Co. v. Baltimore & C. R. R. Co., 149 Ill. 272, 37 N. E. Rep. 91; Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co., 97 Mo. 457, 10 S. W. Rep. 826; St. Louis Transfer R. R. Co. v. St. Louis Merchants' B. & T.

R. R. Co., 111 Mo. 666, 20 S. W. Rep. 319; Hornellsville Electric R. R. Co. v. New York etc. R. R. Co., 83 Hun 407, 31 N. Y. Supp. 745; National Docks etc. R. R. Co. v. State, 53 N. J. L. 217, 21 Atl. Rep. 570, reversing 52 N. J. L. 90, 18 Atl. Rep. 574.

<sup>92</sup> Northern Pacific R. R. Co. v. St. Paul, Minneapolis etc. R. R. Co., 1 McCrary, 302; Union Pacific Ry. Co. v. B. & M. R. R. Co., 1 McCrary, 452; Union Pacific Ry. Co. v. Leavenworth etc. Ry. Co., 29 Fed. Rep. 728; Highland Ave. R. R. Co. v. Birmingham Union R. R. Co., 93 Ala. 505, 9 So. Rep. 568; Metropolitan St. R. R. Co. v. Toledo El. St. R. Co., 9 Ohio C. C. 664.

<sup>93</sup> Brooklyn Central & Jamaica R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420; Market Street Ry. Co. v. Central Ry. Co., 51 Cal. 583.

<sup>94</sup> Lynn & Boston R. R. Co. v. Boston & Maine R. R. Co., 114 Mass. 88.

<sup>95</sup> New York etc. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953; Chicago etc. R. R. Co. v. West Chicago St. R. R. Co., 156 Ill. 255,

to another a right of way across its road, thirty feet wide, on condition, that it should only be used for two tracks, the grantee was held not to be precluded from condemning an additional twenty feet to be occupied by two more tracks.<sup>96</sup>

In the absence of statutory regulation, the place and manner of crossing are left, in the first instance, to the discretion of the crossing road,<sup>97</sup> and it may condemn a right

40 N. E. Rep. 1008, 12 Am. R. R. & Corp. Rep. 522; Pittsburgh etc. R. R. Co. v. West Chicago St. R. R. Co., 54 Ill. App. 273; Chicago etc. Terminal R. R. Co. v. Whitling etc. St. R. R. Co., 139 Ind. 297, 38 N. E. Rep. 604, 11 Am. R. R. & Corp. Rep. 507; Elizabethtown etc. R. R. Co. v. Ashland etc. R. R. Co., 96 Ky. 347, 26 S. W. Rep. 181; Calvert v. State, 34 Neb. 616, 52 N. W. Rep. 687; Morris etc. R. R. Co. v. Newark Pass. R. R. Co., 51 N. J. Ch. 379, 29 Atl. Rep. 184; Buffalo etc. R. R. Co. v. New York etc. R. R. Co., 72 Hun 587, 25 N. Y. Supp. 265; Geneva & W. R. R. Co. v. New York Central etc. R. R. Co., 90 Hun 9, 35 N. Y. Supp. 339; Buffalo etc. R. R. Co. v. Du Bois Traction Pass. R. R. Co., 149 Pa. St. 1, 24 Atl. Rep. 179; Du Bois Traction Pass. R. R. Co. v. Buffalo etc. R. R. Co., 10 Pa. Co. Ct. 401; Delaware etc. R. R. Co. v. Wilkesbarre etc. R. R. Co., 1 Pa. Dist. Ct. 627; Scranton etc. R. R. Co. v. Delaware & H. Canal Co., 1 Pa. Supr. Ct. 409.

<sup>96</sup> Chicago & Western Indiana R. R. Co. v. Illinois Central R. R. Co., 113 Ill. 156.

<sup>97</sup> National Docks etc. R. R. Co. v. United N. J. R. & C. Co., 53 N. J. L. 217, 21 Atl. Rep. 570; Jersey City etc. R. R. Co. v. Central R. R. Co., 48 N. J. Ch. 379,

22 Atl. Rep. 728. In the first case the court (of errors and appeals) says: "The right of one railroad to cross another which is intersected by its route is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between two points, and the general railroad law recognizes this right in railroads incorporated under it in terms so unambiguous as to be tantamount to express authority. This right, however, is by implication from necessity, and its right must therefore be limited by the necessity of the condemning road. In the condemnation of a crossing over the lands of another railroad which are necessary for railroad purposes, all that is acquired is a right of way. After such condemnation, the place of crossing remains in the common use of both railroads for the exercise of their respective franchises. The manner of crossing is not to be destructive of the ability of the road crossed to fully, fairly and freely exercise its franchises. \* \* \* It is within the power of one railroad to determine by the location of its route where it will cross another, and it is impos-

to cross generally or the right to cross in a specified manner.<sup>98</sup> If the crossing company selects a place or manner of crossing that is unnecessarily injurious to the existing company, a court of equity will, upon the application of the latter, intervene to prevent such injury, and, having acquired jurisdiction, may proceed to do equity between the parties by establishing the terms and conditions of crossing.<sup>99</sup> So, if in the use of the common easement, conflict

sible to perceive a sufficient reason why it may not also determine, within lawful bounds, how it shall cross the other. When a crossing is sought in a manner specified in its petition, the condemning company will make compensation for crossing in that single manner, which, if it may thereafter be materially changed, may not be so changed without additional compensation for the damage which the change may occasion. \* \* \* As has been stated, in the acquisition of a right to cross, the ability of the existing company to fully, fairly and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply and maintain highways for the development of the country and the general public benefit; and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of lands used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not

yield, if the proposed interference with it is necessary and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose road is crossed. \* \* \* In recognizing the right of the condemning company to specify a lawful manner of crossing and to condemn a crossing in that manner the right to condemn without such specification must not be lost sight of. Where such a company fails, in its petition, to define how it will cross, but seeks to condemn the privilege of crossing generally, the damages are to be assessed as in the case of the condemnation of lands of private individuals for railroad uses, not only for any manner of crossing at present lawful and necessary, but for lawful changes in that manner of crossing in the future. That which is acquired in such a condemnation, as in the case where the manner of crossing is specified in the petition, is a mere privilege or easement in lands, which are subject to a like privilege in favor of the road which is crossed."

<sup>98</sup> Ibid.

<sup>99</sup> National Docks etc. R. R. Co. v. United N. J. R. R. Co., 53 N.

should at any time arise between the companies, the interposition of equity may be invoked to secure to each the enjoyment of its privileges in a lawful manner.<sup>1</sup> An agreement of one street railway company not to cross the tracks of another street railway company at grade, except at certain places, was held to be against public policy and void.<sup>2</sup> A crossing cannot be made through the yards of the first company, when such crossing would, practically, destroy the utility of the yards, unless the necessity be so great as to make the new enterprise of paramount importance to the public and it cannot be practically accomplished in any other way.<sup>3</sup>

J. L. 217, 21 Atl. Rep. 570; S. C. 52 N. J. L. 90, 18 Atl. Rep. 90, 18 Atl. Rep. 574; Jersey City etc. R. R. Co. v. Central R. R. Co., 48 N. J. Ch. 379, 22 Atl. Rep. 728; Humeston etc. R. R. Co. v. Chicago etc. R. R. Co., 74 Ia. 554, 38 N. W. Rep. 413; Chicago etc. R. R. Co. v. Chicago etc. R. R. Co., 91 Ia. 16, 58 N. W. Rep. 918; In re St. Paul etc. R. R. Co., 37 Minn. 164, 33 N. W. Rep. 701; In re Minneapolis etc. R. R. Co., 39 Minn. 162, 39 N. W. Rep. 65; New York etc. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953; Atchison St. R. R. Co. v. Missouri Pac. R. R. Co., 31 Kan. 660; Union Terminal R. R. Co. v. Board of R. R. Coms., 54 Kan. 352, 38 Pac. Rep. 290.

And see generally as to the jurisdiction of equity in cases of this sort: Highland Ave. R. R. Co. v. Birmingham Union R. R. Co., 93 Ala. 505, 9 So. Rep. 568; Pittsburg etc. R. R. Co. v. West Chicago St. R. R. Co., 54 Ill. App. 273; Chicago etc. R. R. Co. v. West Chicago St. R. R. Co.,

156 Ill. 255, 40 N. E. Rep. 1008; Chicago etc. Terminal R. R. Co. v. Whiting etc. R. R. Co. 139 Ind. 297, 38 N. E. Rep. 604; Calvert v. State, 34 Neb. 616, 52 N. W. Rep. 687; Morris etc. R. R. Co. v. Newark Pass. R. R. Co., 51 N. J. Ch. 379, 29 Atl. Rep. 184; Metropolitan St. R. R. Co. v. Toledo Electric St. R. R. Co., 9 Ohio C. C. 664; Pennsylvania R. R. Co. v. National Docks etc. R. R. Co., 51 Fed. Rep. 858; Same v. Same, 56 Fed. Rep. 697; Same v. Same, 58 Fed. Rep. 929; Chattanooga Terminal R. R. Co. v. Felton, 69 Fed. Rep. 273; Mississippi etc. R. R. Co. v. Texas etc. R. R. Co., 4 Wood 360.

<sup>1</sup> National Docks etc. R. R. Co. v. United N. J. R. R. Co., 53 N. J. L. 217, 21 Atl. Rep. 570; S. C. 52 N. J. L. 90, 18 Atl. Rep. 574; and see Delaware etc. R. R. Co. v. Erie R. R. Co., 21 N. J. Eq. 299; National Docks R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755.

<sup>2</sup> South Chicago City R. R. Co. v. Calumet etc. St. R. R. Co., 70 Ill. App. 254.

<sup>3</sup> Sabine etc. R. R. Co. v. Gulf

§ 268a. **Statutes regulating the right and manner of crossing.**—In some States, by a constitutional provision or statute, the right is given in general terms to any railroad to cross or intersect any other railroad.<sup>4</sup> Such an authority does not differ materially from that which is implied in the absence of any express provision on the subject. In other States there are statutes which are more special in their nature and which make provision for some tribunal to determine the place and manner of crossing.<sup>5</sup> It has been held that such a statute does not apply to a track not laid under the statute, but maintained as a mere convenience and which the company might remove at pleasure, such as a spur to a manufacturing company.<sup>6</sup> The decision of the tribunal fixing the place or manner of crossing will not be disturbed, unless there has been a clear abuse of discretion.<sup>7</sup> Where the statute provided that if the companies could not agree upon the points and manner of crossing, the same should be determined by commissioners appointed by the court, it was held that the commissioners had power to direct all details of construction which would ordinarily be provided for by an agreement between the parties and that their award would stand as a contract between them and could be enforced in the same manner.<sup>8</sup>

etc. R. R. Co., 92 Tex. 162, 48 S. W. Rep. 784.

<sup>4</sup> Lake Shore etc. R. R. Co. v. Baltimore etc. R. R. Co., 149 Ill. 272, 37 N. E. Rep. 91; Elizabethtown etc. R. R. Co. v. Ashland etc. R. R. Co., 96 Ky. 347, 26 S. W. Rep. 181; Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co., 97 Mo. 457, 10 S. W. Rep. 826; St. Louis Trans. R. R. Co. v. St. Louis etc. R. R. Co., 111 Mo. 666, 20 S. W. Rep. 319; National Docks etc. R. R. Co. v. United N. J. R. Co., 53 N. J. L. 217, 21 Atl. Rep. 570, reversing 52 N. J. L. 90, 18 Atl. Rep. 574.

<sup>5</sup> Memphis etc. R. R. Co. v. Birmingham etc. R. R. Co., 96 Ala. 571, 11 So. Rep. 642; New York etc. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953.

<sup>6</sup> In re Railroad Comrs., 83 Me. 273, 22 Atl. Rep. 168.

<sup>7</sup> Matter of Minneapolis etc. R. R. Co., 36 Minn. 481; In re St. Paul etc. R. R. Co., 37 Minn. 164, 33 N. W. Rep. 701; In re Minneapolis etc. R. R. Co., 39 Minn. 162, 39 N. W. Rep. 65; Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mon. 550, 41 Pac. Rep. 248.

<sup>8</sup> Chicago etc. R. R. Co. v.



A statute of Michigan appears to have required that the right to cross should be first condemned and that the manner of crossing should be afterwards fixed by a different tribunal.<sup>9</sup> In Pennsylvania the statute makes it the duty of courts of equity "to ascertain and define by their decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road intended to be crossed," and to avoid a grade crossing if it is reasonably practicable to do so.<sup>10</sup> As to the principles which should obtain in applying this statute it has been said: "Those principles are that in a controversy between two roads as to the location and manner of crossing, while the rights of the road first constructed are to be primarily regarded and protected, the rights and interests of the crossing road are also to receive a reasonable degree of care and consideration, and that a comparatively slight injury or inconvenience to the former need not be avoided when the avoidance would necessarily inflict a great injury upon the latter, or would involve an unreasonable expenditure of money out of all proportion to the damage done."<sup>11</sup> Where the plaintiff company's road was so located as to cross the defendant's twice within four miles, and it was practicable to avoid crossing it at all, a grade crossing was refused.<sup>12</sup> Where a dangerous grade crossing of an electric street railroad over a steam railroad could be avoided at an expense of \$7,000, a grade crossing

Kansas City etc. R. R. Co., 110 Mo. 510, 19 S. W. Rep. 826.

<sup>9</sup> Toledo etc. R. R. Co. v. Detroit etc. R. R. Co., 62 Mich. 564, 29 N. W. Rep. 500; Toledo etc. R. R. Co. v. Detroit etc. R. R. Co., 63 Mich. 645, 30 N. W. Rep. 595.

<sup>10</sup> Act of June 19, 1871, P. L. 1360; Pennsylvania R. R. Co. v. Braddock Electric R. R. Co., 152 Pa. St. 116, 25 Atl. Rep. 780.

<sup>11</sup> Baltimore & P. R. R. Co. v. Philadelphia etc. R. R. Co., 17

Phila. 396. What is reasonably practicable is a physical problem to be determined from the character of the two roads, the business done upon them, the topography of the locality and the like; Scranton & P. Traction Co. v. Del. & H. Canal Co., 180 Pa. St. 636, 37 Atl. Rep. 122.

<sup>12</sup> Perry County R. R. Extension Co. v. Newport etc. R. R. Co., 150 Pa. St. 193, 24 Atl. Rep. 709.

was restrained.<sup>13</sup> Other cases under the Pennsylvania statute are referred to in the margin.<sup>14</sup> Statutes of this sort are local and peculiar and many points are adjudicated which are of no general interest. Some cases not already cited are referred to in the note.<sup>15</sup> Where an

<sup>13</sup> *Pennsylvania R. R. Co. v. Braddock El. R. R. Co.*, 152 Pa. St. 116, 25 Atl. Rep. 780.

<sup>14</sup> As to restraining grade crossings: *Pennsylvania S. V. R. Co. v. Philadelphia etc. R. R. Co.*, 160 Pa. St. 277, 27 Atl. Rep. 784; *Altoona etc. R. R. Co. v. Tyrone etc. R. R. Co.*, 160 Pa. St. 633, 28 Atl. Rep. 997; *Appeal of Philadelphia etc. R. R. Co.*, 2 Walker's Pa. Supm. Ct. 243; *Appeal of Catawissa R. R. Co.*, 2 Walker's Pa. Supm. Ct. 175. On the application of the statute generally: *Reynoldsville etc. R. R. Co. v. Buffalo etc. R. R. Co.*, 134 Pa. St. 541, 19 Atl. Rep. 674; *Buffalo etc. R. R. Co. v. DuBois Traction Pass. R. R. Co.*, 149 Pa. St. 1, 24 Atl. Rep. 179; *Pennsylvania R. R. Co. v. Suburban Rapid Transit Co.*, 11 Pa. Co. Ct. 591; *Pennsylvania R. R. Co. v. Braddock El. R. R. Co.*, 11 Pa. Co. Ct. 163; *Delaware etc. R. R. Co. v. Wilkesbarre etc. R. R. Co.*, 11 Pa. Co. Ct. 165; 1 Pa. Dist. Ct. 627; *Pennsylvania R. R. Co. v. Conshohocken R. R. Co.*, 15 Pa. Co. Ct. 454; *Scranton etc. Traction Co. v. Del. & H. Canal Co.*, 1 Pa. Supr. Ct. 409; *DuBois Traction Pass. R. R. Co. v. Buffalo etc. R. R. Co.*, 10 Pa. Co. Ct. 401; *Philadelphia etc. R. R. Co. v. Pennsylvania S. V. R. R. Co.*, 7 Pa. Co. Ct. 381; *Pennsylvania S. V. R. R. Co. v. Philadelphia etc. R. R. Co.*, 7 Pa. Co. Ct. 490; Phil-

*adelphia etc. R. R. Co. v. Pennsylvania S. V. R. R. Co.*, 7 Pa. Co. Ct. 491; *Pennsylvania R. R. Co. v. Warren St. R. R. Co.*, 188 Pa. St. 74, 41 Atl. Rep. 331; *New York Central etc. R. R. Co. v. Warren St. R. R. Co.*, 188 Pa. St. 85, 41 Atl. Rep. 333; *Chester Traction Co. v. Phila. etc. R. R. Co.*, 188 Pa. St. 105, 41 Atl. Rep. 449; *Union R. R. Co. v. Phila. etc. R. R. Co.*, 188 Pa. St. 115, 41 Atl. Rep. 1119; *Pittsburg Junction R. R. Co. v. Fort Pitt St. Pass. R. R. Co.*, 192 Pa. St. 44; *Western N. Y. etc. R. R. Co. v. Buffalo etc. R. R. Co.*, 193 Pa. St. 127.

<sup>15</sup> *Fort St. Union Depot Co. v. State R. R. Crossing Board*, 81 Mich. 248, 45 N. W. Rep. 973; *Winona etc. R. R. Co. v. Chicago etc. R. R. Co.*, 50 Minn. 300, 52 N. W. Rep. 657; *St. Louis T. R. R. Co. v. St. Louis etc. R. R. Co.*, 100 Mo. 419; *Kansas City Suburban Belt R. R. Co. v. Kansas City etc. R. R. Co.*, 118 Mo. 599, 24 S. W. Rep. 478; *Matter of New York etc. R. R. Co.*, 110 N. Y. 374, 18 N. E. Rep. 120; *Rome etc. R. R. Co. v. Ontario etc. R. R. Co.*, 16 Hun 445; *Matter of New York etc. R. R. Co.*, 33 Hun 270; *Hornelsville El. R. R. Co. v. New York etc. R. R. Co.*, 83 Hun 407, 31 N. Y. Supp. 745; *Geneva etc. R. R. Co. v. New York Central etc. R. R. Co.*, 90 Hun 9, 35 N. Y. Supp. 339; *Gulf etc. R. R. Co. v. Ft. Worth etc. R. R. Co.*,

agreement has been made as to the terms and manner of crossing and a large amount of money expended in pursuance of the agreement, this will preclude a proceeding under the statute.<sup>16</sup>

§ 268b. **Power to intersect, join, connect or unite with other railroads.**—It is frequently provided in constitutions or statutes that railroads shall have the right to intersect or connect with, to join or unite with, any other railroad. These provisions do not confer any right upon one railroad to use the tracks of another longitudinally, or to acquire the right of joint use.<sup>17</sup> They are intended "to authorize merely the bringing together and the forming of a physical union or connection between the tracks of the proposed road and that of the one already built."<sup>18</sup>

§ 269. **Taking railroad property for other public uses.**—Under a general authority conferred upon the city of Buffalo to establish canals, basins, slips; etc., it was held it could not take for a canal a strip of land sixty feet wide and two miles long which was already devoted to railroad uses for main tracks, side tracks and general yard purposes.<sup>19</sup> But such general authority is sufficient to authorize laying out a canal across property so occupied.<sup>20</sup> Under a like general authority to establish and maintain ditches and drains, a ditch cannot be laid out upon and along the right of way of a railroad.<sup>21</sup> A park may be laid out so as to em-

86 Tex. 537, 26 S. W. Rep. 54; Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mon. 550, 41 Pac. Rep. 248.

<sup>16</sup> Rome etc. R. R. Co. v. Ontario etc. R. R. Co., 16 Hun 445; Appeal of Catawissa R. R. Co., 2 Walker's Pa. Supm. Ct. 175.

<sup>17</sup> Pennsylvania R. R. Co. v. B. & O. R. R. Co., 60 Md. 263; Pennsylvania R. R. Co. v. B. & O. R. R. Co., 63 Md. 263; Illinois Central R. R. Co. v. C., B. & Q. R. R. Co., 121 Ill. 483; Atchl-

son etc. R. R. Co. v. B. & O. R. R. Co., 110 U. S. 675.

<sup>18</sup> Illinois Central R. R. Co. v. C., B. & Q. R. R. Co., 121 Ill. 483.

<sup>19</sup> Matter of City of Buffalo, 68 N. Y. 167; S. C. 64 N. Y. 547.

<sup>20</sup> Matter of Maine & Ham-burgh Street Canal, 50 How. Pr. 70.

<sup>21</sup> Baltimore, Ohio & Chicago R. R. Co. v. North, 103 Ind. 486; Lake Erie & W. R. R. Co. v. Board of Comrs., 57 Fed. Rep. 945.

brace property devoted to railroad uses, but the latter use cannot be interfered with without express authority.<sup>22</sup> Where a park act gave the park commissioners exclusive control of property condemned for a park, it was held they could not take a tract embracing part of right of way of a railroad company, though they disclaimed any intent to interfere with the use by the railroad company.<sup>23</sup> But where an act authorized a city to lay out a designated tract of land as a park, which included within its limits a railroad right of way, and it was merely declared in general terms that the land was to be for public use as a park, it was held that the legislative intent was that the park use should be subject to the prior railroad use.<sup>24</sup> So a telegraph may be established along a railroad right of way, it being no material interference with the use for railroad purposes.<sup>25</sup> Nor will the fact that the railroad company has granted to one telegraph company an exclusive right to use its right of way for such purposes, prevent another telegraph company from condemning a right for itself.<sup>26</sup> But a special authority to a telegraph company to build upon, over or under any public road, street or highway is to be construed strictly, and does not authorize construction over a railroad.<sup>27</sup> Property acquired by a railroad company by contract, and used for a purpose for which it could not

<sup>22</sup> Matter of Commissioners of Central Park, 63 Barb. 282; Matter of Mayor etc. of New York, 51 Hun 416, 5 N. Y. Supp. 463; Matter of City of Buffalo, 72 Hun 422, 25 N. Y. Supp. 218; Suburban Rapid Transit Co. v. Mayor etc. of New York, 128 N. Y. 510, 28 N. E. Rep. 525.

<sup>23</sup> Matter of City of Buffalo, 72 Hun 422, 25 N. Y. Supp. 218; and see Boston etc. R. R. Co. v. Cambridge, 166 Mass. 224, 44 N. E. Rep. 140.

<sup>24</sup> Suburban Rapid Transit Co. v. Mayor etc. of New York, 128 N. Y. 510, 28 N. E. Rep. 525.

<sup>25</sup> New Orleans, Mobile etc. R. R. Co. v. Southern & Atlantic Tel. Co., 53 Ala. 211; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Baltimore & Ohio Tel. Co. v. Morgan's La. & Tex. R. R. Co., 37 La. An. 883; Mobile etc. R. R. Co. v. Postal Tel. Cable Co., 120 Ala. 21; St. Louis R. R. Co. v. Postal Tel. Cable Co., 173 Ill. 508; Railroad Co. v. Telegraph Co., 101 Tenn. 62, 46 S. W. Rep. 571.

<sup>26</sup> Ibid.

<sup>27</sup> New York City and Northern R. R. Co. v. Central Union Tel. Co., 21 Hun 261.

condemn, is subject to the power of eminent domain the same as though it belonged to an individual.<sup>28</sup> Where a city was authorized to acquire title to all wharf property within its limits, it was held it could take a wharf owned by a railroad company and occupied for public use in connection with its business.<sup>29</sup> An act in regard to natural gas companies provided that where a pipe line crossed a railroad, the latter should direct the manner of crossing. In such case the action of the railroad company will be sustained unless it is unreasonable.<sup>30</sup> Land of a railroad company which is not needed or used in the operation of its road, may be taken by a city for a public building.<sup>31</sup> Part of the right of way, not in use, may under express authority be condemned for a grain elevator.<sup>32</sup>

§ 270. Taking highways and streets.—Authority to construct a railroad between certain termini does not authorize the appropriation of a highway longitudinally,<sup>33</sup> but the

<sup>28</sup> *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Cincinnati etc. R. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. Rep. 464.

<sup>29</sup> *In re Mayor etc. of New York*, 135 N. Y. 253, 31 N. E. Rep. 1043.

<sup>30</sup> *Ridgway L. & H. Co. v. Pennsylvania R. R. Co.*, 18 Phila. 601.

<sup>31</sup> *Cincinnati etc. R. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. Rep. 464.

<sup>32</sup> *Stewart v. Great Northern R. R. Co.*, 65 Minn. 515, 68 N. W. Rep. 208.

<sup>33</sup> *Davis v. East Tenn. etc. R. R. Co.*, 87 Ga. 605, 13 S. E. Rep. 567; *Town of Rice v. Chicago etc. R. R. Co.*, 30 Ill. App. 481; *Louisville & N. R. R. Co. v. Whitley County Court*, 95 Ky. 215, 24 S. W. Rep. 604; *Cake v. Philadelphia etc. R. R. Co.*, 87 Pa. St. 307; *Magee v. London etc. R. R. Co.*, 6 Grant U. C. 170; *Spring-*

*field v. Connecticut River R. R. Co.*, 4 Cush. 63, 71. In the last case the court says: "As no company or persons have authority to lay out a railroad, except so far as such is conferred by the legislature, the court are of opinion that by a grant of power by a legislative act to lay out a railroad between certain termini, where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, no authority is given *prima facie* to lay such railroad on and along an existing public highway longitudinally, or in other words, to take the roadbed of such highway as the track of their railroad. The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to

right to cross highways is given by necessary implication.<sup>34</sup> A private road cannot be laid out in part along a public road.<sup>35</sup> One public road cannot be laid out along another,<sup>36</sup> although it is no objection that they coincide for a short distance.<sup>37</sup> A State road may be laid out over a county

which it had been legally appropriated. The whole course of legislation, on the subject of railroads, is opposed to such a construction. The crossing of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made, to regulate such crossings, by determining when they shall be on the same and when on different levels, in order to avoid collision; and when on the same level, what gates, fences and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travelers on both. The absence of any such provision affords a strong inference, that, under general terms, it is not intended that such a power should be given." Authority to lay a railroad through a town does not authorize the occupation of a street. St.

Louis etc. R. R. Co. v. Haller, 82 Ill. 208.

And see Chicago etc. R. R. Co. v. Chicago, 121 Ill. 176; Pennsylvania R. R. Co. v. Philadelphia Belt Line R. R. Co., 10 Pa. Co. Ct. 625; Citizens' Pass. R. Co. v. East Harrisburg Pass. R. R. Co., 164 Pa. St. 274, 30 Atl. Rep. 159; Pennsylvania S. V. R. Co. v. Philadelphia etc. R. R. Co., 160 Pa. St. 232, 28 Atl. Rep. 771; Weymouth v. Port Townsend etc. R. R. Co., 6 Wash. 575, 34 Pac. Rep. 154; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. Rep. 849; Thompson v. Ocean City R. R. Co., 60 N. J. L. 74; Tallon v. Hoboken, 60 N. J. L. 212.

<sup>34</sup> Raritan v. Port Reading R. R. Co., 49 N. J. Eq. 11, 23 Atl. Rep. 127; Allen v. Mayor etc. of Jersey City, 53 N. J. L. 522, 22 Atl. Rep. 257; Lewis v. Germantown etc. R. R. Co., 16 Phila. 608.

<sup>35</sup> Boyer's Road, 37 Pa. St. 257.

<sup>36</sup> In re Green St., 1 Mont. Co. L. R. 37.

<sup>37</sup> People v. Commissioners, 37 N. Y. 360; Chester Road, 2 Rawle, 421; Hess's Mill Road, 21 Pa. St. 217; Southampton Road, 21 Pa. St. 356; Reserve Tp. Road, 80 Pa. St. 165; In re Road in Springdale Tp., 91 Pa. St. 260; Road in Hilltown, 2 Walker's Pa. Supm. Ct. 78; Road in Halse Tp.,

road, or a county road over a town road,<sup>38</sup> and it is said that the two may co-exist on the same ground.<sup>39</sup> A pike company organized under a general law cannot locate upon an existing highway.<sup>40</sup> Authority to a plank-road company to use part of a highway when necessary, does not warrant the use of a highway for its entire length.<sup>41</sup> Where a plank-road company is authorized to take a highway, it is entitled to the exclusive use of the same, and it cannot afterwards be occupied by a street railroad company, or thrown open to the public without compensation.<sup>42</sup> Authority to construct water-works is not authority to occupy part of a street for a reservoir.<sup>43</sup> The statutes in regard to mill-dams do not justify the flooding of highways.<sup>44</sup> The charter of the New York & Brooklyn Bridge Co. provides that the bridge "shall not obstruct any street which it shall cross, but that such street shall be spanned by a suitable arch or suspended platform, as shall give suitable height for the passage under the same for all purposes of public travel and transportation." It was held to prohibit any obstruction, however slight, and that columns could not be erected in the street spanned for the support of the superstructure.<sup>45</sup> The legislature may of course authorize the

6 Luzerne Leg. Reg. Rep. 463; *In re Green St.*, 1 Mont. Co. L. R. 37.

<sup>38</sup> *Bisher v. Richards*, 9 Ohio St. 495; *Wells v. County Comrs.*, 79 Me. 522.

<sup>39</sup> *Bisher v. Richards*, 9 Ohio St. 495.

<sup>40</sup> *Groff v. Bird-in-Hand Turnpike Co.*, 128 Pa. St. 621, 18 Atl. Rep. 431; affirmed on rehearing, 144 Pa. St. 150, 22 Atl. Rep. 834.

<sup>41</sup> *Justices of Inferior Court v. Plank-road Co.*, 9 Ga. 475. And see *Justices etc. v. Griffin etc. Road Co.*, 15 Ga. 39.

<sup>42</sup> *Detroit etc. R. R. Co. v. Detroit Suburban R. R. Co.*, 103 Mich. 585, 61 N. W. Rep. 880;

*City of Savannah v. Vernon Shell Road Co.*, 88 Ga. 342, 14 S. E. Rep. 610. Such taking absolves the public authorities from the duty of keeping it in repair. *State v. Hampton*, 2 N. H. 22.

<sup>43</sup> *Ex parte The Manhattan Co.*, 22 Wend. 653.

<sup>44</sup> *Commonwealth v. Stevens*, 10 Pick. 247; *State v. Phipps*, 4 Ind. 515; *Venard v. Cross*, 8 Kan. 248; *Morgan v. Banta*, 1 Bibb, 579.

<sup>45</sup> *People ex rel. Stranahan v. Thompson*, 98 N. Y. 6; *S. C. Sp. T.* 67 How. Pr. 491. In the following case the defendant company was authorized to construct

condemnation of additional easements in public highways, as for railroads, electric lines, etc.<sup>46</sup>

§ 270a. **Railroads across highways and streets.**—As stated in the last section a railroad has an implied authority to cross highways and streets<sup>47</sup> and the consent of local authorities is not necessary unless required by statute, which is sometimes the case.<sup>48</sup> Whether expressly required to do so or not, it is the duty of the railroad to restore the highway to its former condition of usefulness, as nearly as practicable.<sup>49</sup> It is generally required to do so by statute and this duty may be enforced by appropriate remedies.<sup>50</sup> This duty is a continuing one and requires the company to keep the crossing in repair.<sup>51</sup> But the railroad company is not bound to keep a bridge in repair which it has not disturbed, although it happens to be embraced within the lines of its right of way.<sup>52</sup> If it goes over the highway, it must leave the highway clear and cannot place its abutments in the margin, though the space is not needed and is overgrown with brush and weeds.<sup>53</sup> It cannot change the location of the highway unless expressly au-

a canal and to occupy any lands and tenements with certain exceptions not including streets; it was held it could occupy or flood parts of certain streets. The circumstances of the case were peculiar and there was what amounted to legislative authority by necessary implication. *Richmond v. James River & Kanawha Co.*, 12 Leigh, 278.

<sup>46</sup> *Canandaigua v. Benedict*, 24 N. Y. App. Div. 348.

<sup>47</sup> §270, note 34.

<sup>48</sup> *St. Louis etc. R. R. Co. v. Haller*, 82 Ill. 208; *Chicago etc. R. R. Co. v. Chicago*, 121 Ill. 176.

<sup>49</sup> *Palatka etc. R. R. Co. v. State*, 23 Fla. 546; *Kyne v. Wilmington etc. R. R. Co.*, 8 Houst. 185. So when a canal crosses a highway. *Leopard v. Chesa-*

*peake etc. Canal Co.*, 1 Gill, 222.

<sup>50</sup> *Veazie v. Mayo*, 45 Me. 560; *Dickinson v. New Haven etc. Co.*, 155 Mass. 16, 34 N. E. Rep. 334; *Little Miami R. R. Co. v. Comrs.*, 31 Ohio St. 338; *Concord Township's Appeal*, 1 Walker's Pa. Supm. Ct. 195; *City of Chester v. Baltimore etc. R. R. Co.*, 140 Pa. St. 275, 21 Atl. Rep. 320; *State v. Kansas City etc. R. R. Co.*, 54 Ark. 608, 16 S. W. Rep. 651.

<sup>51</sup> *Conshohocken R. R. Co. v. Pennsylvania R. R. Co.*, 15 Pa. Co. Ct. 445.

<sup>52</sup> *Ohio & Miss. R. R. Co. v. Bridgeport*, 63 Ill. App. 224.

<sup>53</sup> *Township of Raritan v. Port Reading R. R. Co.*, 49 N. J. Eq. 11, 23 Atl. Rep. 127.



thorized to do so,<sup>54</sup> but this is permitted in some States.<sup>55</sup> A statute that when a railroad is hereafter built across any public highway it shall construct a crossing in a particular manner, does not apply where the highway is opened across the railroad.<sup>56</sup>

§ 271. Bridges, turnpikes, ferries, canals and mill property.—A toll-bridge,<sup>57</sup> turnpike,<sup>58</sup> or ferry<sup>59</sup> may be taken for a highway when expressly authorized by the legislature, but not without such express authority.<sup>60</sup> A provision in the charter of a toll-bridge company that the State may purchase it on specified terms, does not prevent the condemnation of the bridge by a county under a subsequent act.<sup>61</sup> Where a toll road is built through a canon, it may be occupied by another similar road, in place, where there

<sup>54</sup> *Buchholz v. New York etc. R. R. Co.*, 148 N. Y. 640, 43 N. E. Rep. 76. Here there was a change without authority, and the railroad was compelled to restore the old crossing at the suit of parties injured.

<sup>55</sup> *North Manheim v. Reading etc. R. R. Co.*, 18 Phil. 650; *Abington Tp. v. North Pa. R. R. Co.*, 12 Pa. Co. Ct. 118.

<sup>56</sup> *Prairie County v. Fink*, 65 Ark. 492, 47 S. W. Rep. 301.

<sup>57</sup> *Central Bridge Corporation v. Lowell*, 4 Gray, 474; *Northampton Bridge Case*, 116 Mass. 442; *Smith v. Conway*, 17 N. H. 586; *State v. Canterbury*, 28 N. H. 195; *Crosby v. Hanover*, 36 N. H. 404; *In re Towanda Bridge Co.*, 91 Pa. St. 216; *West River Bridge Co. v. Dix*, 16 Vt. 446; *S. C. 6 How.* 507; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 454; *Red River Bridge Co. v. Clarks-ville*, 1 Sneed, 176; *Blaine County v. Brewster*, 32 Neb. 264, 49 N.

W. Rep. 183; *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. St. 54, 20 Atl. Rep. 407; *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. St. 379, 27 Atl. Rep. 726; *Bethlehem Toll-Bridge*, 12 Pa. Co. Ct. 311.

<sup>58</sup> *Backus v. Lebanon*, 11 N. H. 19; *Case of Kensington*, 2 Rawle, 445; *Armington v. Barnett*, 15 Vt. 745; *Philadelphia etc. R. R. Co.'s Appeal*, 120 Pa. St. 90, 13 Atl. Rep. 708.

<sup>59</sup> *Sullivan v. Board of Supvrs.*, 58 Miss. 790; *McRoberts v. Washburne*, 10 Minn. 23.

<sup>60</sup> *Sullivan v. Board of Supvrs.*, 58 Miss. 790; *Board of Supervisors v. McFadden*, 57 Miss. 613; *Barber v. Andover*, 8 N. H. 398; *West Boston Bridge Co. v. County Comrs. of Middlesex*, 10 Pick. 270; *Little Nestucca Road Co. v. Tellamook County*, 31 Or. 1.

<sup>61</sup> *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. St. 379, 27 Atl. Rep. 726; *Bethlehem Toll-Bridge*, 12 Pa. Co. Ct. 311.

is not room for two roads.<sup>62</sup> Where a railroad crossed a turnpike overhead, it was held it could not build piers upon the pike.<sup>63</sup> Land belonging to a ferry company and not necessary to the enjoyment of its franchise, may be taken by a bridge corporation, under a general power.<sup>64</sup> Under a general authority to construct a telegraph line a company may condemn the right to erect poles on the outer line of a turnpike.<sup>65</sup> A general authority is sufficient to authorize a railroad company to construct its road across a turnpike,<sup>66</sup> but not to occupy it longitudinally.<sup>67</sup> So a canal may be crossed by a highway without special authority,<sup>68</sup> but cannot be occupied longitudinally unless expressly authorized.<sup>69</sup> General power to construct drains and sewers does not authorize a sewer across canal lands so as to discharge into the canal.<sup>70</sup> Mill-ponds may be crossed by a railroad, though in a slight degree diminishing the capacity of the pond,<sup>71</sup> and mill-dams authorized by statute may be taken or impaired for public use by the legislature.<sup>72</sup> A general

<sup>62</sup> D. C. R. R. Co. v. C. & G. R. R. Co., 8 Or. 102; C. & G. R. R. Co. v. Stephenson, 8 Or. 263.

<sup>63</sup> Turnpike R. R. Co. v. Pennsylvania R. R. Co., 6 Mont. Co. L. R. 121. But see Turnpike Road Co. v. Pennsylvania R. R. Co., 6 Mont. Co. L. R. 105.

<sup>64</sup> Wheeling & B. Bridge Co. v. Belmont Bridge Co., 34 W. Va. 155, 11 S. E. Rep. 1009; S. C. affirmed, 138 U. S. 287, 11 Sup. Ct. Rep. 301.

<sup>65</sup> Turnpike Co. v. American News Co., 43 N. J. L. 381.

<sup>66</sup> White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Baltimore & Havre de Grace Turnpike Co. v. Union R. R. Co., 35 Md. 224; La Fayette Plank Road Co. v. New Albany & Salem R. R. Co., 13 Ind. 90.

<sup>67</sup> Kenton County Court v. Bank Lick Turnpike Co., 10

Bush, 529; In Brainard v. Missisquoi R. R. Co., 48 Vt. 107, which might seem to conflict with the text, the question was not involved and not decided.

<sup>68</sup> Morris Canal Co. v. State, 24 N. J. L. 62.

<sup>69</sup> State v. Newark, 28 N. J. L. 529. But a railroad may be located along or over an abandoned canal. Savannah etc. Canal Co. v. Suburban etc. R. R. Co., 93 Ga. 240, 18 S. E. Rep. 824; Schuylkill Nav. Co. v. Pottsville & M. R. R. Co., 17 Phil. 648.

<sup>70</sup> Proprietors of Locks & Canals v. Lowell, 7 Gray, 223.

<sup>71</sup> White v. South Shore R. R. Co., 6 Cush. 412; Boston Water Power Co. v. Boston & Worcester R. R. Co., 23 Pick. 360.

<sup>72</sup> Hazen v. Essex Co., 12 Cush. 475.

authority to municipalities to condemn land, water, water rights and property for the purpose of securing a supply of water for public use, was held not to authorize the taking of the water rights of a canal company devoted to public use by authority of law.<sup>73</sup>

§ 272. Property of gas and water companies, parks, cemeteries, school property, etc.—A railroad company cannot, under its general power to construct a road between certain termini, locate its road through a tract of land acquired by a city for a reservoir.<sup>74</sup> A city authorized to construct water works may lay its pipes through the lands of a water company where it can be done without material interference.<sup>75</sup> One water company cannot condemn the property of another,<sup>76</sup> but may take works belonging to a partnership, which were not constructed under statutory authority.<sup>77</sup> A city may of course be authorized to condemn the plant of a water company.<sup>78</sup> Land of a gas company not in use by it, and which is indispensable to a railroad company, may be taken by the railroad, though there is some prospect that it may be required by the gas company in the future.<sup>79</sup> But where a railroad sought to take land in use by a gas company and indispensable to the operation of its works, it was held that it could not be done unless there was "a necessity so absolute that without it the grant itself would be defeated."<sup>80</sup> The general authority to lay out and con-

<sup>73</sup> State v. Jersey City, 58 N. J. L. 262, 33 Atl. Rep. 740.

<sup>74</sup> State v. Montclair R. R. Co., 35 N. J. L. 328.

<sup>75</sup> Matter of Rochester Water Comrs., 66 N. Y. 413; and see Lake Pleasant Water Co. v. Contra Costa Water Co., 67 Cal. 659.

<sup>76</sup> Lebanon Water Co., 9 Pa. Co. Ct. 589.

<sup>77</sup> Edgewood Water Co. v. Troy Water Co., 7 Pa. Co. Ct. 476.

<sup>78</sup> Brady v. Atlantic City, 53 N. J. Eq. 440, 32 Atl. Rep. 271; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. Rep.

983. In Colby University v. Canandaigua, 69 Fed. Rep. 671, a statute is construed and held not to require a village to condemn water works of a quasi public company.

<sup>79</sup> New York Central & Hudson River R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326; Spring City Gas Light Co. v. Pennsylvania S. V. R. R. Co., 167 Pa. St. 6, 31 Atl. Rep. 368. And see Scranton Gas & W. Co. v. Coal & I. Co., 145 Pa. St. 21, 23 Atl. Rep. 461.

<sup>80</sup> Scranton Gas & W. Co. v.

struct railroads and highways does not authorize a location through a public park.<sup>81</sup> The same may be said of cemeteries which are for public use.<sup>82</sup> But a railroad may be laid along a river bank through a cemetery, over grounds which are not suitable for burial purposes, and which will not therefore be a material interference.<sup>83</sup> In *Balch v. County Commissioners*,<sup>84</sup> it was held that land held for a parish burial ground could be taken to enlarge a town burial ground. Where the act incorporating a cemetery association provided that no road, street or alley should be laid through its grounds without its consent, it was held that the provision was not repealed by a subsequent general village incorporation act which gave the power in general terms to lay out streets.<sup>85</sup> But, in a similar case, where the subsequent act authorized the municipality to take property for streets, any private statute to the contrary notwithstanding, it was held that the restriction was abrogated.<sup>86</sup> Under authority to lay out parks in New York

*Northern Coal & Iron Co.*, 192 Pa. St. 80.

<sup>81</sup> *Wellington et al. Petitioners*, 16 Pick. 87; *Matter of New York & Brighton Beach R. R. Co.*, 20 Hun 201; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574.

<sup>82</sup> *Egypt Street*, 2 Grant's Cases, 455; see *Sacks v. Minneapolis*, 75 Minn. 30.

<sup>83</sup> *Wood v. Macon & Brunswick R. R. Co.*, 68 Ga. 539.

<sup>84</sup> 103 Mass. 106.

<sup>85</sup> *Hydo Park v. Cemetery Association*, 119 Ill. 141.

<sup>86</sup> In re *Twenty-second Street*, 15 Phila. 409; S. C. 102 Pa. St. 108. The acts involved in this case were as follows: By a private act, passed March 20, 1849 (P. L. 194), it was enacted that "No street, road, lane or alley shall be hereafter opened through the land of the United

*American Mechanics and Daughters of America Cemetery or Burial Place*, except with the consent of said corporation, nor shall the same be liable to be taken or used for any object not connected with or appertaining to burial purposes, and shall be exempt from taxation," etc. An act of April 8, 1881 (P. L. 68), enacted that "The municipalities and courts having jurisdiction in any city of this commonwealth shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys and highways within the limits of such city, and may open or widen streets at such points and of such width as may be deemed necessary by such city authorities and courts, any private or special statute to the con-

city and to take "any and all lands" for that purpose south of 155th street, it was held a cemetery could be taken.<sup>87</sup> There is no question as to the power of the legislature to provide for such taking.<sup>88</sup> Lands and buildings in actual use for public schools cannot be taken for other public uses under a general authority.<sup>89</sup> But this rule will not protect schools of any and every size. It has been held that a strip of land may be taken from a school lot, which might impair, but did not prevent, its continued use for school purposes.<sup>90</sup> Pipe lines may doubtless be laid over or under a railroad, so as not to interfere with its operation.<sup>91</sup>

§ 272a. Taking land devoted to other public or quasi public uses.—A few miscellaneous cases are here noted, it being understood that the authority in question was a general one, unless otherwise stated. The public square of a village cannot be taken for a school house.<sup>92</sup> So it has been held that a school house site cannot be taken from a county poor farm.<sup>93</sup> But it has also been held that pipe lines may be laid through such a farm.<sup>94</sup> A street may not be opened through the grounds of a State lunatic asylum.<sup>95</sup> A grant

trary notwithstanding; proceedings to be had in such cases as are now required by law."

<sup>87</sup> *In re Board Street Openings*, 133 N. Y. 329, 31 N. E. Rep. 102, affirming 62 Hun 499, 42 N. Y. St. 836, 16 N. Y. Supp. 894.

<sup>88</sup> *Woodmen Cemetery v. Roulo*, 104 Mich. 595, 62 N. W. Rep. 1010.

<sup>89</sup> *Road in Pottsgrove Tp.*, 4 Mont. Co. L. Rep. 114, 5 Pa. Co. Ct. 361. In *Rominger v. Simmons*, 88 Ind. 453, it was held that under general authority a highway might be laid out so as to take part of a public school house and grounds, but this decision seems to us contrary to both the current and the reason of the authorities and wholly in-

consistent in principle with *Baltimore & Ohio R. R. Co. v. North*, 103 Ind. 486, decided by the same court.

<sup>90</sup> *Easthampton v. County Comrs.*, 154 Mass. 424, 28 N. E. Rep. 298.

<sup>91</sup> *United N. J. R. R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 123; *Central R. R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 127.

<sup>92</sup> *Davis v. Nichols*, 39 Ill. App. 610.

<sup>93</sup> *Tyrone School District's Appeal*, 1 Monaghan, (Pa. Supm. Ct.) 20.

<sup>94</sup> *Southwest Penn. Pipe Lines v. Directors of the Poor*, 1 Pa. Co. Ct. 460.

<sup>95</sup> *In re City of Utica (Hun)*, 26 N. Y. Supp. 564.

to a railroad in general terms of the right to enter upon and use lands belonging to the State, does not authorize the taking of land in use for a State institution for the blind.<sup>96</sup> It has been held that a township drain cannot be laid out over a county drain,<sup>97</sup> but that a county drain may be laid over a township drain.<sup>98</sup> In Indiana it is said to be the settled doctrine that a new ditch may be laid out over the line of a ditch previously established and constructed.<sup>99</sup> Land in use by a city for water pipes, may be taken for a highway, there being no inconsistency in the two uses.<sup>1</sup> Church property stands upon the same footing as other private property.<sup>2</sup> So of a market-house erected by a private corporation and run for profit.<sup>3</sup> The fact that the sale of certain State lands is prohibited by the constitution, does not prevent the legislature from permitting streets, canals and railroads to be laid over them.<sup>4</sup> It has been said by the supreme court of the United States: "It may be that by the exercise of this power under extraordinary emergencies property which had been dedicated to public use, but the enjoyment of which was principally limited to a local community might be taken for higher and national purposes, and disposed of in the same principles which subject private property to be taken."<sup>5</sup> A subway for railroads may be built through a public park or common by express authority.<sup>6</sup>

§ 273. Works upon, across or over navigable waters.—Waters where the tide ebbs and flows, and navigable

<sup>96</sup> St. Louis etc. R. R. Co. v. Trustees, 43 Ill. 303.

<sup>97</sup> Zabel v. Harshman, 68 Mich. 273, 36 N. W. Rep. 71.

<sup>98</sup> Miller v. Board of Comrs., 3 Ohio C. C. 617.

<sup>99</sup> Rogers v. Venis, 137 Ind. 221, 36 N. E. Rep. 841; Meranda v. Spurlin, 100 Ind. 380; Drebert v. Trier, 106 Ind. 510, 7 N. E. Rep. 223; Hardy v. McKinney, 107 Ind. 364, 8 N. E. Rep. 232.

<sup>1</sup> City of Boston v. Brookline.

156 Mass. 172, 30 N. E. Rep. 611.

<sup>2</sup> Macon etc. R. R. Co. v. Riggs, 87 Ga. 158, 13 S. E. Rep. 312.

<sup>3</sup> Twelfth St. Market Co. v. Philadelphia etc. R. R. Co., 142 Pa. St. 580, 21 Atl. Rep. 989.

<sup>4</sup> Parmelee v. Oswego etc. R. R. Co., 7 Barb. 599.

<sup>5</sup> New Orleans v. United States, 10 Pet. p. 723.

<sup>6</sup> Prince v. Crocker, 166 Mass. 347, 44 N. E. Rep. 446.

streams, whether tidal or not, stand upon the same footing as public highways and other property devoted to public use. They cannot be interfered with or occupied under a mere general authority to take property for public use. Thus a highway cannot be built over tidal waters<sup>7</sup> or a bridge thrown across a navigable stream,<sup>8</sup> without express authority.<sup>9</sup> And where express authority is given it must be strictly pursued,<sup>10</sup> and also strictly construed.<sup>11</sup> Authority to construct a railroad along a river was held not to authorize its construction upon or over the river.<sup>12</sup> But the legislature may authorize a railroad to be built over navigable waters.<sup>13</sup> A city may not build a street across a navigable water way so as to destroy it.<sup>14</sup>

§ 274. Corporate property and franchises may be taken.—Although a corporate charter is a contract and protected by the constitution of the United States, yet the rights and privileges secured by it are property, and, like all other property, are subject to the eminent domain power of the State.<sup>15</sup> It follows, therefore, that not only all corporate

<sup>7</sup> *State v. Anthoine*, 40 Me. 435; *Marblehead v. County Comrs. of Essex*, 5 Gray 451; and see *Haskell v. New Bedford*, 108 Mass. 209.

<sup>8</sup> *Charlestown v. County Comrs. of Middlesex*, 3 Met. 202.

<sup>9</sup> In Connecticut it is held that a bridge may be built across the entrance to a cove where the tide ebbs and flows, but which is not navigable for any useful purposes of commerce, under a general authority in regard to highways. *Weathersfield v. Humphry*, 20 Conn. 218; *Groton v. Hurlbut*, 22 Conn. 178. Also that, under a like general authority, a bridge may be built over a navigable stream, provided it is constructed with a draw. *Brown v. Preston*, 38 Conn. 219.

<sup>10</sup> *Cape Elizabeth v. County Comrs.* 64 Me. 456.

<sup>11</sup> Thus authority to bridge a navigable stream was held not to authorize a bridge such as to destroy navigation, that not being indispensable. *Hickok v. Hine*, 23 Ohio St. 523.

<sup>12</sup> *Stevens v. Erie R. R. Co.*, 21 N. J. Eq. 259.

<sup>13</sup> *Kerr v. West Shore R. R. Co.*, 127 N. Y. 269, 27 N. E. Rep. 833.

<sup>14</sup> *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. Rep. 934, 5 Am. R. R. & Corp. Rep. 176.

<sup>15</sup> *West River Bridge Co. v. Dix*, 6 How. 507; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 454; *Crossly v. O'Brien*, 24 Ind. 325; *La Fayette Plank Road Co. v. New Albany & Salem R. R. Co.*,

property,<sup>16</sup> but the corporate franchises themselves, may be appropriated to public use as the public exigencies require.<sup>17</sup> This point is now too well settled to require any discussion, and we simply quote from one of the leading cases on the subject sufficiently to show the course of reasoning upon which the authorities go:

"Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the

13 Ind. 90; Boston Water Power Co. v. Boston & Worcester R. R. Co., 23 Pick. 360; Central Bridge Corporation v. Lowell, 4 Gray, 474; Grand Rapids, Newago & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R. Co., 35 Mich. 265; Backus v. Lebanon, 11 N. H. 19; State v. Canterbury, 28 N. H. 195; Crosby v. Hannover, 36 N. H. 404; Matter of Petition of Ker, 42 Barb. 119; Case of Kensington, 2 Rawle, 445; In re Towanda Bridge Co., 91 Pa. St. 216; Lewis v. Germantown etc. R. R. Co., 16 Phila. 621; Red River Bridge Co. v. Clarksville, 1 Sneed, 176; West River Bridge Co. v. Dix, 16 Vt. 446; Armington v. Barnett, 15 Vt. 745; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; James River & Kanawha Co. v. Thompson, 3 Gratt. 270.

<sup>16</sup> Mobile etc. R. R. Co. v. Ala-

bama Midland R. R. Co., 87 Ala. 501, 6 So. Rep. 404; Macon etc. R. R. Co. v. Riggs, 87 Ga. 158, 13 S. E. Rep. 312; Trustees Atlanta University v. City of Atlanta, 93 Ga. 468, 21 S. E. Rep. 74; Metropolitan City R. R. Co. v. Chicago W. D. R. R. Co., 87 Ill. 317; Baltimore & F. Turnpike Road v. Baltimore etc. R. R. Co., 81 Md. 247, 31 Atl. Rep. 854; In re Opinion of the Justices, 66 N. H. 629, 33 Atl. Rep. 1076; Twelfth St. Market Co. v. Philadelphia R. R. Co., 142 Pa. St. 580, 21 Atl. Rep. 989; Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 S. C. Rep. 622; New York Central etc. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326; Bellona Co.'s Case, 3 Bland Ch. 442; In re Twenty-second Street, 15 Phila. 409.

<sup>17</sup> See cases cited in note 15.



citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof."<sup>18</sup>

The lock and dam of a navigation company created by State authority to improve the navigation of a river may be taken by congress in furtherance of its power to regulate commerce between the States, but not without com-

<sup>18</sup> Daniel, J., in *West River Bridge Co. v. Dix*, 6 How. 507, 532; and see language to the same effect by Bigelow, J., in *Central Bridge Corporation v. Lowell*, 4 Gray, 474, 480, 481.

pensation for both the property and franchise of the company.<sup>19</sup>

§ 275. **Exclusive rights and privileges.**—The legislature cannot divest itself of its sovereign powers. If it should expressly stipulate with a corporation or individual that certain rights and property should not be taken or interfered with under its right of eminent domain, it would be nugatory, because beyond its power. The legislature may grant exclusive rights and privileges, but such rights and privileges remain subject to the eminent domain power. Hence, an exclusive right to maintain a toll-bridge or ferry may be taken upon making compensation.<sup>20</sup> So an exclusive right to maintain any kind of a public way between two points,<sup>21</sup> or to lay down and operate horse railroads upon certain streets,<sup>22</sup> or to construct a telegraph along a railroad right of way.<sup>23</sup> The fact of any right or privilege being exclusive does not change its nature, it only affects its value. It is merely property, and, like all other property, may be taken upon making just compensation.<sup>24</sup>

§ 276. **General principles deducible from the foregoing decisions in respect to the taking of property already devoted to public use.**—First. All property held for public use is still subject to the eminent domain power of the State, with this exception: that it cannot be taken to be used for the same purpose in the same manner. If this were not so, then, as remarked by a learned judge, "great

<sup>19</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. C. Rep. 322.

<sup>20</sup> *Piscataqua Bridge Co. v. New Hampshire Bridge*, 7 N. H. 35.

<sup>21</sup> *Salem & Hamburg Turnpike Co. v. Lyme*, 18 Conn. 451.

<sup>22</sup> *Phila. & Gray's Ferry Passenger Ry. Co.'s Appeal*, 102 Pa. St. 123; *Street Ry. Co. v. West Side Street Ry. Co.*, 48 Mich. 433. So a right of one horse railroad

company not to have any competing railroad laid down on certain streets may be taken. *Metropolitan Ry Co. v. Chicago West Div. Ry. Co.*, 87 Ill. 317.

<sup>23</sup> *New Orleans etc. R. R. Co. v. Southern & Atlantic Tel. Co.*, 53 Ala. 211; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; *Baltimore & Ohio Tel. Co. v. Morgan's La. & Tex. R. R. Co.*, 37 La. An. 883.

<sup>24</sup> See generally ante, §§ 135-139.

public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts, might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete."<sup>25</sup> But the legislature cannot take the property of A, such as a toll-bridge, and transfer it to B. to be still used as a toll-bridge by B in the same manner as it had previously been by A.<sup>26</sup> This would simply be taking the property of A and giving it to B, which the legislature is powerless to do.<sup>27</sup> This rule is a restriction upon the power of the legislature and is doubtless limited to the cases, where the result of the act would be to transfer the property of A to B, both being private individuals or corporations. The rule would not prevent the taking by the State

<sup>25</sup> Bigelow, J., in *Central Bridge Corporation v. Lowell*, 4 Gray, 474, 482.

<sup>26</sup> *West River Bridge Co. v. Dix*, 6 How. 507, 537.

<sup>27</sup> In *Cary Library v. Bliss*, 151 Mass. 364, it was held that the legislature could not authorize a corporation to acquire the property of a public library, which was managed by a board of trustees composed of the selectmen, the school committee and settled ministers of the town, the property "to be held and applied by the corporation in the same manner as if held by said trustees." The court says: "The question arises, whether taking property from one party, who holds it for public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the constitution. Can such a taking be founded on a public necessity? It is unlike

taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the legislature to be, a matter of public necessity."

or a public corporation of property in the hands of an individual or private corporation, to be still used for the same public purpose, because it would not continue to be used for the same purpose in the same manner. Thus a city may be authorized to take the works of a water or light company or street railroad, though they are still to be used for supplying water, light or transportation as before, for they will be operated solely for the public benefit and not for private gain.<sup>28</sup>

Second. The right to take property already devoted to public use must be given in express terms or by necessary implication.<sup>29</sup>

Third. Whether such authority has been given in any

<sup>28</sup> See ante, § 272; Little Nes-tucca Road Co. v. Tellamook County, 31 Or. 1.

<sup>29</sup> Cases cited in §§ 266 et seq.; and see especially Boston Water Co. v. Boston & Worcester R. R. Co., 23 Pick. 360; Springfield v. Connecticut River R. R. Co., 4 Cush. 63; Proprietors of Locks & Canals v. Lowell, 7 Gray 223; Housatonic etc. R. R. Co. v. Loe & Hudson R. R. Co., 118 Mass. 391; Boston & Maine R. R. Co. v. Lowell, 124 Mass. 333; Providence & Worcester R. R. Co. v. Norwich & Worcester R. R. Co., 138 Mass. 277; New Jersey & Southern R. R. Co. v. Long Branch Comrs., 39 N. J. L. 28; Matter of Boston & Albany R. R. Co., 53 N. Y. 574; People ex rel. Stranahan v. Thompson, 98 N. Y. 6; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 501, 6 So. Rep. 404; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 520, 6 So. Rep. 407; Illinois Central R. R. Co. v. Chicago etc. R. R. Co., 122 Ill. 473; Cincinnati etc. R. R. Co. v.

City of Anderson, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17; Louisville & N. R. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. Rep. 604; Old Colony R. R. Co. v. Framingham Water Co., 153 Mass. 561, 27 N. E. Rep. 662; Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mon. 504, 41 Pac. Rep. 232; Cincinnati etc. R. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. Rep. 464; Appeal of Pittsburgh Junction R. R. Co., 122 Pa. St. 511, 16 Atl. Rep. 564; Appeal of Sharon R. R. Co., 122 Pa. St. 533, 17 Atl. Rep. 234; Groff v. Bird-in-Hand Turnpike Co., 128 Pa. St. 621, 18 Atl. Rep. 431; S. C. affirmed on rehearing, 144 Pa. St. 150, 22 Atl. Rep. 834; Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co., 8 Pa. Co. Ct. 10; Lewis v. Germantown etc. R. R. Co., 16 Phil. 621; Barre R. R. Co. v. Montpelier R. R. Co., 61 Vt. 1, 17 Atl. Rep. 923; In re Bronson, 1 Ontario, 415.

case, either in express terms or by implication, is necessarily a question for the courts.<sup>30</sup>

Fourth. Whether the power exists in any given case is a question of legislative intent, to be ascertained in the first place from the terms of the statute, and in the second place by the application of the statute to the subject matter. If the language of the statute is explicit, as where a particular turnpike is authorized to be taken and laid out as an ordinary highway, the courts have nothing to do but to give effect to the express language of the statute. But, if the language of the statute is not explicit, then it is a question of reasonable intendment, in view of all the circumstances of the case. Authority to construct a railroad through a narrow gorge already occupied by a public way would authorize the use of the old way if the new road could not reasonably be built without it.<sup>31</sup> The chief difficulty arises when authority to condemn property for any purpose is given in general terms, as is usually the case in these latter years. In such case the presumption is against the right to take property which is already devoted to public use.<sup>32</sup> This presumption

<sup>30</sup> See cases cited in the last note, in all of which the question was entertained, and in some of which the power claimed was found to exist and in others not.

<sup>31</sup> *Matter of City of Buffalo*, 68 N. Y. 167, 173; *Anniston & Cincinnati R. R. Co. v. Jacksonville*, Gadsden & Attalla R. R. Co., 82 Ala. 297; *Denver & R. G. Ry. Co. v. Denver*, S. P. & P. R. R. Co., 17 Fed. Rep. 867; *Montana Central Ry. Co. v. Helena etc. R. R. Co.*, 6 Mon. 416.

<sup>32</sup> "In determining whether a power generally given, is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the

public use to which it is applied, the extent to which that use would be impaired, or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an

may be overcome by showing a reasonable necessity for the property desired, as compared with its necessity and importance to the use to which it is already devoted.<sup>33</sup> Two

effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject matter of it, so that, by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." *Matter of City of Buffalo*, 68 N. Y. 167, 175.

<sup>33</sup> *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 63. In this case the defendant company was authorized by statute to build a branch road from its main track in Cabotville "to and near the mills in said village, passing up the south bank of Chicopee River, near the same, and thence extending up said river to the Chicopee Falls village." The company laid its track along a public street, and this was a bill to enjoin its use. In pronouncing the opinion of the court, Chief Justice Shaw says: "In the present case, it is manifest, that there are no words in the act of 1845 which give the defendants authority to locate and construct their railroad over Front street, where it was actually laid, or over any

other highway in Cabotville; and if they had the power, it must be derived from necessary implication, though no such implication appears on the face of the act. If it exists, it must arise from the application of the act to the subject matter, so that the railroad could not, by reasonable intendment, be laid in any other line. The grant of a right is, by reasonable construction, a grant of power to do all the acts reasonably necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing its being laid elsewhere; but if, to the minds of reasonable men, conversant with the subject, another line could have been adopted between the termini, without taking the highway, reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking of the highway." In order to show the mode adopted in that case, which was an ordinary equity suit for the purpose of determining the question, we quote the directions found at the end of the opinion: "It is a fit case, therefore, in our judgment, to be referred to three commissioners, of competent skill and experience in such subjects, to examine the whole subject, and to consider

conditions must concur in order to authorize such taking. There must be some necessity therefor on the part of the condemnor and the taking must not destroy or seriously impede the use to which the property is already devoted. As to the degree of necessity which must exist there is, as might be expected, considerable difference of opinion. Some courts have held that the necessity must be an absolute one,<sup>34</sup> but the better opinion is that it must be a reasonable one.<sup>35</sup> Whether any general rule can be laid down as to what will constitute a reasonable necessity, may be doubted. But we should say that there was a reasonable necessity for the taking where the public interests would be better subserved thereby, or where the advant-

and report: Whether under the grant of an authority to the defendants to construct and open for use a branch railroad from the junction or main track of their road in the village of Cabotville, to and near the mills in said village, passing up the south bank of Chicopee River, near the same, and thence extending up said river into the Chicopee Falls village, it was, by fair and reasonable intendent, necessary to lay and construct the same upon and along Front street, or either of the public ways in Cabotville or not; and as incident to this inquiry, to consider, whether, by such fair and reasonable intendent, the said railroad could or could not have been laid out and constructed, 1st, between Front street and the canal; or, 2d, over the canal; or, 3d, between the canal and the mills; or, 4th, between the mills and the bank of the Chicopee River; considering for this purpose, the street, the canals, the mills, the land, and

the entire space between the street and Chicopee River, as they were in March, 1845, when the act was passed by the legislature. Also, if they should be of opinion, that it was not necessary to lay the railroad over Front street, where it now is, whether any, and if any, what further fences, gates, barriers, guards, or other precautions are required by the act of 1846, c. 271, in order to render it safe and convenient for the general travel, to pass through, over and across that street."

<sup>34</sup> Appeal of Pittsburgh Junction R. R. Co., 122 Pa. St. 511, 16 Atl. Rep. 564; Appeal of Sharon R. R. Co., 122 Pa. St. 533, 17 Atl. Rep. 234; Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150; Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co., 8 Pa. Co. Ct. 10; Lewis v. Germantown etc. R. R. Co., 16 Phila. 621; Illinois Central R. R. Co. v. Chicago etc. R. R. Co., 122 Ill. 473.

<sup>35</sup> Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87

ages to the condemnor will largely exceed the disadvantages to the condemnee.<sup>36</sup> What has been said in a prior section as to railroad companies organized under general laws, where the corporators select their own location,<sup>37</sup> will apply to all corporations so organized, whether for the construction of railroads or other public works. The necessity which is meant in this connection must arise in carrying out the expressed intent of the legislature, or the authority expressly given. The authority given in a general incorporation law is to take private property for a specified public use, leaving it to the incorporators to determine the location of their works and the property to be taken. It cannot be supposed that such an authority as this was intended to interfere with any prior public use and the circumstances would have to be very peculiar to justify it.

Under the general laws of Illinois a corporation may be organized for the purpose of constructing a road from any point in the State to the city of Chicago. But the general authority which such a corporation would have, would not authorize it to condemn the terminal facilities of an existing road, or to pass through its depot or freight houses, or to take a school building or the water works or the court house. It would be authorized to extend its road into the city to such a point as would reasonably accommodate the public and render the enterprise reasonably successful. While it could not pass through the depot of another company, it might infringe slightly on its depot grounds or cut

Ala. 501, 6 So. Rep. 404; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 520, 6 So. Rep. 407; Cincinnati etc. R. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17; Butte etc. R. R. Co. v. Montana U. R. R. Co., 16 Mon. 504, 41 Pac. Rep. 232; Springfield v. Conn. Riv. R. R. Co., 4 Cush. 63; Old Colony R. R. Co. v. Framingham Water Co., 153 Mass. 561, 27 N. E. Rep.

662; Cincinnati etc. R. R. Co. v. Belle Centre, 48 Ohio St. 273, 27 N. E. Rep. 464. The Montana case will be found especially exhaustive and instructive.

<sup>36</sup> Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 501, 6 So. Rep. 404; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 520, 6 So. Rep. 407.

<sup>37</sup> Ante, § 267b.



a corner from one of its freight buildings.<sup>38</sup> But any interference that might reasonably be avoided could not reasonably be made. So much as to the necessity of the condemnor. The other condition which must exist in order to justify the taking of property already devoted to public use, under a general incorporation law, or a like general authority, is that the proposed taking shall not destroy, or cripple or seriously interfere with the prior public use.<sup>39</sup> A general authority to construct public works upon locations to be selected by the incorporators, or persons availing themselves of the grant, cannot be construed into a legislative intent that existing public works, which the legislature could not have had in mind, should be destroyed or crippled. Just what would be such a material or serious impairment of an existing public use, as to preclude the proposed taking, is one of these uncertain questions as to which no general rule can be laid down.<sup>40</sup> The whole ques-

<sup>38</sup> *Chicago & N. W. R. R. Co. v. Chicago & E. R. R. Co.*, 112 Ill. 589.

<sup>39</sup> *Cincinnati etc. R. R. Co. v. City of Anderson*, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17; *Easthampton v. County Comrs.*, 154 Mass. 424, 28 N. E. Rep. 298; *City of Boston v. Brookline*, 156 Mass. 172, 30 N. E. Rep. 611; *St. Louis etc. R. R. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. Rep. 483; *Butte etc. R. R. Co. v. Montana etc. R. R. Co.*, 16 Mon. 504, 41 Pac. Rep. 232; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155, 11 S. E. Rep. 1009; S. C. affirmed, 138 U. S. 287, 11 S. C. Rep. 301; *Lake Erie etc. R. R. Co. v. Board of Comrs.*, 57 Fed. Rep. 945.

<sup>40</sup> "The question whether such interference or inconsistency would arise is not to be settled

with reference to every possible manner in which the land might be used for the purpose for which it had been acquired, but with a reasonable regard to the way in which it would naturally and reasonably be used in putting it to that purpose." *City of Boston v. Brookline*, 156 Mass. 172, 30 N. E. Rep. 611. Where the location of a street through the yards of a railroad company would require the removal of a turntable, water tank, engine house and coal dock, the opening will be enjoined, though it appears that the structures could be rebuilt and conveniently used on other land of the company. *Cincinnati etc. R. R. Co. v. City of Anderson*, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17. And see cases cited in last and following note.

tion covered by the section is ably discussed in the cases cited below.<sup>41</sup>

- § 277. Extent of interest which the legislature may authorize to be taken.—In the absence of any constitutional restraint, it rests with the legislature to say what interest or estate in lands shall be taken for public use.<sup>42</sup> The whole matter thus being in the discretion of the legislature,

<sup>41</sup> Matter of Boston & Albany R. R. Co., 53 N. Y. 574; Boston & Maine R. R. Co. v. Lowell & Lawrence R. R. Co., 124 Mass. 368; Housatonic R. R. Co. v. Lee & Hudson R. R. Co., 113 Mass. 391; Baltimore & Ohio R. R. Co. v. North, 103 Ind. 486; New York & Long Branch R. R. Co. v. Drummond, 46 N. J. L. 644; Milwaukee & St. Paul Ry. Co. v. Faribault, 23 Minn. 167; Prospect Park & Coney Island R. R. Co. v. Williamson, 91 N. Y. 552; New York Central & Hudson Riv. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 501, 6 So. Rep. 404; Mobile etc. R. R. Co. v. Alabama Midland R. R. Co., 87 Ala. 520, 6 So. Rep. 407; Illinois Central R. R. Co. v. Chicago etc. R. R. Co., 122 Ill. 473; Cincinnati etc. R. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17; Baltimore & F. Turnpike Road v. Baltimore etc. R. R. Co., 81 Md. 247, 31 Atl. Rep. 854; Providence & W. R. R. Co. v. Norwich & W. R. R. Co., 138 Mass. 277; Easthampton v. County Comrs., 154 Mass. 424, 28 N. E. Rep. 298; St. Louis etc. R. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. Rep. 483; Butte etc. R. R. Co. v. Mon-

tana etc. R. R. Co., 15 Mon. 504, 41 Pac. Rep. 232; Appeal of Pittsburgh Junction R. R. Co., 122 Pa. St. 511, 16 Atl. Rep. 554; Appeal of the Sharon R. R. Co., 122 Pa. St. 533, 17 Atl. Rep. 234; Groff v. Bird-in-Hand Turnpike Co., 128 Pa. St. 621, 13 Atl. Rep. 431; S. C. affirmed on rehearing, 144 Pa. St. 150, 22 Atl. Rep. 834; Pittsburgh Junction R. R. Co. v. Allegheny V. R. R. Co., 146 Pa. St. 297, 23 Atl. Rep. 313; Barre R. R. Co. v. Montpelier R. R. Co., 61 Vt. 1, 17 Atl. Rep. 923; Wheeling Bridge Co. v. Wheeling & B. Bridge Co., 34 W. Va. 155, 10 S. E. Rep. 1009.

<sup>42</sup> Edgerton v. Huff, 26 Ind. 35; Water Works Co. v. Burkhart, 41 Ind. 364; Challiss v. Atchison, Topeka & Santa Fe R. R. Co., 16 Kan. 117; Heyward v. New York, 7 N. Y. 314; Sweet v. Buffalo, New York & P. Ry. Co., 79 N. Y. 293; Dingley v. Boston, 100 Mass. 544; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law, N. C. 451; DeVaraigne v. Fox, 2 Blatch. 95; Smith v. Hall, 103 Ia. 95; Doon v. Natick, 171 Mass. 223, 50 N. E. Rep. 616; Barnett v. Commonwealth, 169 Mass. 417; Quick v. Taylor, 113 Ind. 540; Eldridge v. City of Birmingham, 120 N. Y. 309, 24 N. E. Rep. 462; Matter of Thompson, 57 Hun 419, 10 N. Y. Supp. 705;

it may authorize a fee to be taken,<sup>43</sup> and necessarily may authorize any lesser estate or interest to be taken, according to its views of the requirements of the grantee and the demands of the public good.<sup>44</sup> The estate which may be taken is not controlled by the use, but a fee may be taken, though the use is not to be permanent.<sup>45</sup> It has been held that the legislature may authorize the taking of land without the buildings or trees thereon,<sup>46</sup> but in such case the measure of damages would seem to be the value of the whole property less the value of the buildings or trees for removal.<sup>47</sup> In the absence of express authority land cannot be taken without the buildings. The condemnor must take it as it is.<sup>48</sup>

§ 278. What right, estate or interest may be taken or acquired under particular statutes.—Upon the principle that statutes conferring compulsory powers are to be

*Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. Rep. 325. Where the constitution limited the estate which might be taken for railroad purposes to an easement, and a statute authorized a fee to be taken, it was held that the statute was modified by the constitution and would be effectual to vest an easement in the company. *Scott v. St. Paul & Chicago Ry. Co.*, 21 Minn. 322.

<sup>43</sup> Cases cited in last note and *Prather v. Western Union Tel. Co.*, 89 Ind. 501; *Taylor v. Baltimore*, 45 Md. 576; *Heyward v. New York*, 7 N. Y. 314; S. C. 8 Barb. 438; *Malone v. Toledo*, 34 Ohio St. 541; *Patterson v. Boom Co.*, 3 Dill 465; see *New Orleans Ry. Co. v. Gay*, 32 La. An. 471; *New Orleans Pacific Ry. Co. v. Gay*, 31 La. An. 430; *Morgan's La. & Texas R. R. Co. v. Bourdier*, 1 McGloin, La. 232; *Sweet v. Rechel*, 159 U. S. 380, 16 S. C. Rep. 43.

<sup>44</sup> This section quoted and followed in *State v. Hudson County Board*, 55 N. J. L. 88, 25 Atl. Rep. 322.

<sup>45</sup> *Eldridge v. City of Binghamton*, 120 N. Y. 309, 24 N. E. Rep. 462. Acts of Congress authorizing the enlistment or drafting of colored persons and slaves of loyal persons, and providing that slaves should become free, was held invalid by the Kentucky court on the ground that Congress could only take the use of the slave. *Corbin v. Marsh*, 2 Duvall, 193; *Hughes v. Todd*, 2 Duvall, 188.

<sup>46</sup> *State v. Hudson County Board*, 55 N. J. L. 88, 25 Atl. Rep. 322; *Taylor v. Railroad Co.*, 33 N. J. L. 28; *St. Louis v. Conn. Mutual Life Ins. Co.*, 90 Mo. 135.

<sup>47</sup> *Murray v. County of Norfolk*, 149 Mass. 328, 21 N. E. Rep. 757.

<sup>48</sup> *Chicago etc. R. R. Co. v. Ward*, 128 Ill. 345, 18 N. E. Rep. 528, 21 N. E. Rep. 562.

strictly construed, it follows that, where the estate taken is not defined, only such an estate or interest will vest as is necessary to accomplish the purpose in view,<sup>49</sup> and where an easement is sufficient, no greater estate can be taken.<sup>50</sup> Thus, under authority to take land for a highway, railroad or other like use, only an easement can be acquired.<sup>51</sup> If the statute provides that a fee shall vest, it is usually held to mean a fee simple absolute,<sup>52</sup> but, in *Kellogg v. Mallin*,<sup>53</sup> where the act provided that a fee simple title should vest in a railroad company to its right of way, it was held to mean a qualified or terminable fee, and that the land would revert if the company ceased to use it for the purposes for which it was taken. Where the law provides that land taken for streets shall vest in the municipality in fee simple, it is held to mean a qualified fee and the city cannot dispose of the land for other purposes.<sup>54</sup> Where the act provided,

<sup>49</sup> *Clark v. Worcester*, 125 Mass. 226; *Washington Cemetery Co. v. Prospect Park etc. R. R. Co.*, 68 N. Y. 591; *New Orleans Ry. Co. v. Gay*, 32 La. An. 471; *Strong v. Brooklyn*, 68 N. Y. 1; *Board of Comrs. v. Beckwith*, 10 Kan. 603; *Henry v. Dubuque & Pacific R. R. Co.*, 2 Ia. 288; *Heyneman v. Blake*, 19 Cal. 579; *Quick v. Taylor*, 113 Ind. 540; *City of Newton v. Perry*, 163 Mass. 319, 39 N. E. Rep. 1032; *Vought v. Columbus etc. R. R. Co.*, 58 Ohio St. 123.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Washington Cemetery Co. v. Prospect Park etc. R. R. Co.*, 68 N. Y. 591; *Strong v. Brooklyn*, 68 N. Y. 1; *People ex rel etc. v. Blake*, 19 Cal. 579; *Harbeck v. Boston*, 10 Cush. 295; *McCombs v. Stewart*, 40 Ohio St. 647; *Cornwin v. Cowan*, 12 Ohio St. 629; *Pittsburgh etc. R. R. Co. v.*

*Bruce*, 102 Pa. St. 23; *Raleigh etc. R. R. Co. v. Sturgeon*, 120 N. C. 225.

<sup>52</sup> *Malone v. Toledo*, 28 Ohio St. 643; *S. C. 34 Ohio St.* 541; *People v. White*, 11 Barb. 26; *Rexford v. Knight*, 15 Barb. 627; *Birdsall v. Cary*, 66 How. Pr. 358; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Board of Trustees*, 71 Ind. 208; *Logansport v. Shirk*, 88 Ind. 563; *Mason v. Lake Erie etc. Ry. Co.*, 9 Biss. 239.

<sup>53</sup> 50 Mo. 496. And see *Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70, 65 N. W. Rep. 136.

<sup>54</sup> *Fairehild v. St. Paul*, 46 Minn. 540, 49 N. W. Rep. 325. The court says: "But, notwithstanding the broad language used in the city charter, we think it must be construed as only a qualified or terminable fee,—that is, the fee simple for

in respect of lands taken for a canal, that the State should be seized of an absolute estate in perpetuity, it was held to mean an ordinary fee simple.<sup>55</sup> Where the language of the act was that a railroad company should be "seized and possessed of the land" taken, it was held to take only an easement.<sup>56</sup> Where the act provided that the title to the land taken should vest in the party condemning, it was held, in one case where the taking was by a city for sewerage purposes, that a fee vested,<sup>57</sup> and in another, where the taking was by a turnpike company, that only an easement vested.<sup>58</sup> If the legislature defines the interest which shall be taken or acquired, a less interest than that specified cannot be taken.<sup>59</sup> Under a statute which provides that a fee shall vest upon condemnation proceedings, an easement for a sewer<sup>60</sup> or for water pipes cannot be acquired.<sup>61</sup> But, if the act simply authorizes the taking of a fee, or the right to use and occupy forever, or for a term of years, an easement for a water conduit may be taken.<sup>62</sup> Under authority "to

street purposes,—which gives the city absolute control over the land for those purposes, but that its title is not a proprietary, but what might be called a sovereign or prerogative, one, which it, as an agency of the State, holds in trust for the public for street purposes, and which it can neither sell nor devote to a private use." And see ante, §§ 91k, 91l.

<sup>55</sup> *Haldeman v. Pennsylvania R. R. Co.*, 50 Pa. St. 425; *North Branch Canal Co. v. Hixson*, 44 Pa. St. 418; *Wyoming Coal & Transportation Co. v. Price*, 81 Pa. St. 156. See *State v. Snook*, 53 Ohio St. 521, 42 N. W. Rep. 544.

<sup>56</sup> *Quimby v. Vermont Central R. R. Co.*, 23 Vt. 387.

<sup>57</sup> *Page v. O'Toole*, 144 Mass. 303. In a subsequent case it was held that an easement could be

taken. *Conklin v. Old Colony R. R. Co.*, 154 Mass. 155, 28 N. E. Rep. 143.

<sup>58</sup> *Dunham v. Williams*, 36 Barb. 136.

<sup>59</sup> *Matter of Water Comrs. of Amsterdam*, 96 N. Y. 351; *De Camp v. Hibernia Underground R. R. Co.*, 47 N. J. L. 43; *S. C.* 47 N. J. L. 518; *Roanoke City v. Berkowitz*, 80 Va. 616; *Currier v. Marietta & Cincinnati R. R. Co.*, 11 Ohio St. 228; *Pinchin v. London & Blackwall Ry. Co.*, 24 L. J. N. S. Ch. 417; *Charlottesville v. Manny*, 96 Va. 383, 31 S. E. Rep. 520. See *McGregor v. Equitable Gas. Co.*, 139 Pa. St. 230, 21 Atl. Rep. 13.

<sup>60</sup> *Roanoke City v. Berkowitz*, 80 Va. 616.

<sup>61</sup> *Matter of Water Comrs. of Amsterdam*, 96 N. Y. 351.

<sup>62</sup> *Taylor v. Baltimore*, 45 Md.

take by purchase or otherwise" the water of Gates pond and water rights, lands, easements, etc., to supply a town with water, it was held that the town need not take the fee of the pond, but could reserve to the owner a right of access to the pond for cattle and to cut ice and to otherwise enjoy the use of it.<sup>63</sup> A water company had power to appropriate "all such lands and waters as may be required for the purposes of the company." It was held that it could condemn the right to construct a tunnel for pipes.<sup>64</sup> Under a similar power it has been held that a fee could be taken.<sup>65</sup> A railroad cannot appropriate land for a limited period to be used while its main track is being reconstructed.<sup>66</sup> Un-

576; *Charleston etc. R. R. Co. v. Blake*, 12 Rich. S. C. 634.

<sup>63</sup> *Tyler v. Hudson*, 147 Mass. 609. The court says: "The right to take the land by purchase or otherwise does not involve the obligation to take the whole interest in land purchased or otherwise taken. That a right of way could be reserved in land taken by purchase will not be questioned; the objection to reserving a right in the owner in land taken in invitum is technical rather than substantial. It is true, that, in a sense, it may be said to create a new estate in him without his assent. A technical answer might be, that, the estate being for his benefit, his consent and acceptance simultaneous with the taking will be presumed. The real answer is that the refinement and non-encumbrance of conveyancing will not be applied to a taking by right of eminent domain. No more land and no greater interest in it need be taken than the public use requires. If the right to make a particular use of the land is of benefit to the owner,

and puts no new burden upon him, and does not interfere with the public use for which the land is taken, there is no reason that he should be deprived of that use, and be paid its value as damages; all the right to use the land except that right may be taken, and that be left in him to enjoy or not as he pleases. If the right is of value, a valuable right in the land will remain in him, though he may refuse to exercise it."

<sup>64</sup> *Heyneman v. Blake*, 19 Cal. 579. "The right to condemn the lands includes the right to condemn any estate or interest therein which may be necessary for the purposes of the company." To same effect: *Titus v. Boston*, 149 Mass. 164, 21 N. E. Rep. 310; *Matter of Thompson*, 57 Hun 419, 10 Co. Rep. 705.

<sup>65</sup> *Water Comrs. v. Lawrence*, 3 Edw. ch. \*552; see also *Holt v. Somerville*, 127 Mass. 408.

<sup>66</sup> *Currier v. Marietta & Cincinnati R. R. Co.*, 11 Ohio St. 228; see *Wheelock v. Young*, 4 Wend. 647.

der a statute which authorized the condemnation of lands and materials, a railroad attempted to condemn a way through a vein of coal underground, but without taking a support for its road-bed, leaving the owner at liberty to mine the coal underneath, and providing that, in such case, it might either support its tracks by timbers or excavate a new roadway in the wall of the vein. It was held that it could not condemn less than a way for its road and so much of the coal and strata underneath as was necessary for its support; also, that it could not condemn a right to shift its road-bed as proposed.<sup>67</sup> Under a power to condemn lands it was held that the right to the flow of a stream over land could not be taken without taking the bed of the stream.<sup>68</sup> Where only such an estate could be taken as was necessary it was held to be a question of fact whether a fee was necessary.<sup>69</sup> Under such an authority a fee cannot be taken simply for materials.<sup>70</sup> Under authority to take land necessary for obtaining, taking and conveying water and laying, constructing and maintaining aqueducts, a perpetual right to take material for construction and repair in a tract of fifty acres, cannot be condemned.<sup>71</sup> A greater estate cannot be taken than the statute authorizes.<sup>72</sup>

§ 279. **How much may be taken.**—It is the province of the legislature to determine the quantity, as well as the estate, which may be taken for public use.<sup>73</sup> If the quantity is specified or a maximum prescribed, no more can be

<sup>67</sup> *DeCamp v. Hibernia Underground R. R. Co.*, 47 N. J. L. 43, affirmed in 47 N. J. L. 518; see also *Brown v. Corey*, 43 Pa. St. 495; *Matter of Hartford & Connecticut Western R. R. Co.*, 65 How. Pr. 133.

<sup>68</sup> *Watson v. Acquackanonk Water Co.*, 36 N. J. L. 195.

<sup>69</sup> *New Orleans R. R. Co. v. Gay*, 32 La. An. 471.

<sup>70</sup> *Eversfield v. Mid-Sussex R. R. Co.*, 3 De G. & J. 286, 2 Jur. N. S. 776; *Bentink v. Norfolk Estuary Co.*, 8 De G. M. & G.

714, 3 Jur. N. S. 345, 26 L. J. Ch. 404; Compare *Water Comra. v. Lawrence*, 3 Edw. ch. \*552.

<sup>71</sup> *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, 45 N. E. Rep. 925.

<sup>72</sup> *Fletcher v. Chicago etc. R. R. Co.*, 67 Minn. 339.

<sup>73</sup> *Matter of Union Ferry Co.*, 98 N. Y. 139; *Hingham & Quincy Bridge & Turnpike Corporation v. County of Norfolk*, 6 Allen, 353; *United States v. Gettysburg Electric R. R. Co.*, 160 U. S. 688, 16 S. C. Rep. 427.

taken.<sup>74</sup> If the authority permits the acquisition of as much as may be necessary, or in still more general terms confers the power to condemn property for the purposes of the undertaking, it will be construed to authorize the taking of so much as may be reasonably necessary under the circumstances.<sup>75</sup> More may be taken than is needed in the present, in anticipation of the increased demands of the future.<sup>76</sup> Where a canal company took an entire tract, when it might have left a valuable property to the owner after satisfying its reasonable needs, the inquisition was set aside.<sup>77</sup> In general the condemnor is allowed a large discretion in determining the quantity necessary and the exercise of this discretion will not be interfered with except in case of abuse.<sup>78</sup>

<sup>74</sup> *Pittsburgh Nat'l Bank of Commerce v. Shoenberger*, 111 Pa. St. 95; *County of Ramsey v. Stees*, 28 Minn. 326.

<sup>75</sup> *Tedens v. Sanitary District of Chicago*, 149 Ill. 87, 36 N. E. Rep. 1033; *Cheyney v. Atlantic City Waterworks Co.*, 55 N. J. L. 235, 26 Atl. Rep. 95; *Matter of South Branch R. R. Co.*, 119 N. Y. 141, 23 N. E. Rep. 486, affirming 53 Hun 131, 25 N. Y. St. 328, 6 N. Y. Supp. 172; *Wisconsin Central R. R. v. Cornell*, 49 Wis. 162; *Coe v. Aiken*, 61 Fed. Rep. 24; *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401. In this case a strip half a rod in width was held to be a reasonable amount for a telegraph line. That which is convenient may be taken, though not necessary in the strict sense. *Sadd v. Maddon Ry. Co.*, 6 Exch. 143; and see *Wilks v. Georgia Pac. R. R. Co.*, 79 Ala. 180. Where a railroad company was empowered to take so much land as they might think necessary for the purposes of the company, it was held that the

company must produce other evidence of necessity than the affidavit of their engineer. *Flower v. London etc. R. R. Co.*, 2 D. & S. 330, 34 L. J. Eq. 540. A company may be enjoined from taking more than is necessary. *Webb v. Manchester etc. R. R. Co.*, 4 Mylne & Craig 116.

<sup>76</sup> *Lodge v. Phila. Wilmington & Baltimore R. R. Co.*, 8 Phila. 345; *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251; *Pittsburgh, etc., R. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. Rep. 612; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585.

<sup>77</sup> *Chesapeake & Ohio Canal Co. v. Mason*, 4 Cranch, 123.

<sup>78</sup> *Bennett v. Marion*, 106 Ia. 628, 76 N. W. 844; *Schuster v. Sanitary District*, 177 Ill. 626, 52 N. E. Rep. 855. See ante, §§ 238, 239 and post § 393. In the case first cited it is said: "If the land sought to be taken will to some extent conduce to the public use for which it is to be devoted, the decision of the municipality that it is necessary therefor, should



§ 280. **Same: Instances.**—Authority to a railroad to take one hundred feet in width was held to refer to right of way only, and not to ground for depots, side tracks, etc., at stations.<sup>79</sup> The same authority to a turnpike company was held to preclude it from taking land for a toll-house beyond the hundred feet.<sup>80</sup> The hundred feet may be taken, though the company owns lands adjacent thereto.<sup>81</sup> Where the act prohibits the taking of more than sixty feet for a highway, the authorities may accept a donation of more.<sup>82</sup> An act provided that a road should not exceed eighty feet in width, it was held that one road could not be laid out alongside another so that both should exceed eighty feet.<sup>83</sup> A railroad company was authorized to take and hold so much real estate as should be necessary for the location, construction and convenient use of its railway, "the land so taken otherwise than by consent of owners, shall not exceed one hundred feet in width except for wood and water stations unless where greater width is necessary for excavation, embankment or depositing earth." It was held it could condemn more than one hundred feet for the purposes specified.<sup>84</sup> Where a railroad company was authorized to take a strip one hundred feet wide, or more, if necessary for cutting and filling, and the petition was to condemn one hundred and twenty feet, and the right was not questioned in the court below, it was held to have been conceded.<sup>85</sup> But where the company proposes to take more than the specified amount, the burden is on it to show the necessity, and the fact that

not be interfered with; otherwise it should be set aside." p. 633.

<sup>79</sup> *Carmody v. Chicago & Alton R. R. Co.*, 111 Ill. 69. See *Crandall v. Des Moines, etc., R. R. Co.*, 103 Ia. 684.

<sup>80</sup> *Lessee of Kemper v. Cincinnati etc. Turnpike Co.*, 11 Ohio, 392.

<sup>81</sup> *Stark v. Sioux City & Pacific R. R. Co.*, 43 Ia. 501; *St. Louis etc. R. R. Co. v. Petty*, 57

*Ark.* 359, 21 S. W. Rep. 884; to same effect; *matter of New York Central R. R. Co.*, 59 Hun 7.

<sup>82</sup> *Hays v. Lewis*, 28 Ohio St. 326; and see *Embury v. Connor*, 3 N. Y. 511.

<sup>83</sup> *Road Case*, 4 W. & S. 39.

<sup>84</sup> *Johnson v. Chicago, Milwaukee & St. Paul Ry. Co.*, 58 Ia. 537.

<sup>85</sup> *Booker v. Venice & Caralilet Ry. Co.*, 101 Ill. 333; *Bowman v. Same*, 102 Ill. 459.

more is needed at one place, on account of a cut, will not justify taking a wider strip through an entire farm.<sup>86</sup> The taking of a strip one hundred feet wide for an open conduit twenty feet wide will not be adjudged excessive or unreasonable in the absence of evidence on the subject.<sup>87</sup> Under power to take "for the location and construction of a school house and for the convenient use of the school," land may be taken for a playground.<sup>88</sup> A proceeding to condemn eighty acres of a tract of one hundred and forty acres for a sewer outlet was sustained.<sup>89</sup> In the absence of any limitation in the statutes, a street may be laid out with space for parkways, in addition to that needed for walks and traffic.<sup>90</sup> In condemning land for a reservoir a margin may be taken around the reservoir, to protect it from pollution.<sup>91</sup> In a proceeding to condemn a large tract of land in order to obtain the subterranean waters for a public water supply it was held proper to take the fee simple title and also much more ground than the works would occupy in order to prevent any use of the surface that would contaminate the supply.<sup>92</sup>

**§ 281. Construction of statutes prohibiting the taking of certain buildings and enclosures: Dwellings.—Statutes**

<sup>86</sup> *Robinson v. Pennsylvania R. Co.*, 161 Pa. St. 561, 29 Atl. Rep. 268.

<sup>87</sup> *Cheyney v. Atlantic City Water Works Co.*, 55 N. J. L. 235, 26 Atl. Rep. 95.

<sup>88</sup> *District of Oakland v. Hewitt*, 105 Ia. 663.

<sup>89</sup> *Bennett v. Marion*, 106 Ia. 628, 76 N. W. Rep. 844.

<sup>90</sup> *Matter of Curran*, 38 App. Div. N. Y. 82. The court says: "There can be no doubt that a municipality in the exercise of the right of eminent domain, may take land for street purposes. There is no limit or restriction upon such right in respect of the width of the strip of land which shall be taken for

such purpose, save only that in some sense the land taken may be regarded as useful or necessary for the purpose for which it is taken. Nor is the right limited to the number of feet necessary in a given case for the purpose of furnishing a passage for pedestrians and vehicles and other traffic. Land may also be taken in connection with such specific use for the purpose of furnishing ample space for the access of light and air, and also to beautify and adorn."

<sup>91</sup> *Matter of Gilroy*, 32 N. Y. App. Div. 216.

<sup>92</sup> *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585.

frequently prohibit the taking of certain buildings and enclosures for rights of way. A lay-out in violation of such a statute is void.<sup>93</sup> In general, it may be said that such statutes should receive a reasonable construction, such as will substantially protect private rights without needless embarrassment to public improvements.<sup>94</sup> A billiard saloon, built as an L to a tavern, and used in connection therewith, is part of a dwelling,<sup>95</sup> but otherwise if the billiard saloon is detached.<sup>96</sup>

A dwelling-house includes so much of the yard or curtilage as is necessary for its reasonable enjoyment.<sup>97</sup> A statute prohibited the invasion of a dwelling-house or any space within sixty feet thereof. The limitation of sixty feet was held to apply only to land belonging to the owner, and not to prevent a road within sixty feet on the land of another.<sup>98</sup> A dwelling, to be protected by the statute, must have been erected in good faith.<sup>99</sup> The statute prohibited the laying out of a cemetery within twenty rods of any dwelling, store or other place of business. This was held to apply as well to a purchase as to a condemnation,<sup>1</sup> but

<sup>93</sup> Cuyler v. Rochester, 12 Wend. 165; ex parte Clapper, 3 Hill, 458; Extension of Twenty-second Street in Columbia, 23 Pa. St. 346; Fore v. Western N. C. R. R. Co., 101 N. C. 526, 8 S. E. Rep. 335; State v. Allen, 58 N. J. L. 315, 33 Atl. Rep. 199; Fredericks v. Hoffmeister, 62 N. J. L. 565.

<sup>94</sup> Lansing v. Caswell, 4 Paige, 519.

<sup>95</sup> State v. Troth, 36 N. J. L. 422.

<sup>96</sup> State v. Troth, 34 N. J. L. 377.

<sup>97</sup> Swift & Given's Appeal, 111 Pa. St. 516; Damon v. Baltimore R. R. Co., 119 Pa. St. 287, 13 Atl. Rep. 217; Stahl v. Pennsylvania Co., 155 Pa. St. 309, 26 Atl. Rep. 437; Rudolph v. Pennsyl-

vania S. V. R. R. Co., 166 Pa. St. 430, 31 Atl. Rep. 131. Contra: Wells v. Somerset & Kennebec R. R. Co., 47 Me. 345.

<sup>98</sup> Richmond & York River R. R. Co. v. Wicker, 13 Gratt. 375.

<sup>99</sup> A statute prohibited the condemnation of a quarry within two hundred yards of any dwelling. Appellant, while the company was organizing, erected a frail shanty within two hundred yards of the quarry in question, which was occupied by tenants and then by free negroes. It was held to be a question of good faith, and the finding of the jury that it was not in good faith was affirmed. Morris v. Schallsville Branch etc., 4 Bush 443.

<sup>1</sup> Stevens v. Manchester, 63 N. H. 390.

not to prevent the taking of land with such building upon it.<sup>2</sup> An act which prohibits a town or city from establishing a cemetery within twenty rods of any dwelling, store or place of business, does not prevent a proprietor from using his own land for that purpose within the prescribed distance.<sup>3</sup> The attempt to establish a cemetery within two hundred yards of a dwelling in violation of a statute may be enjoined.<sup>4</sup> A statute prohibited the laying out of a highway so as to require the removal of "any dwelling-house, market-house or other public building heretofore erected." Held that the words "heretofore erected" referred to the time of the lay out and not to the passage of the act.<sup>5</sup> A Pennsylvania statute prohibits the location of a railroad passing through any dwelling-house in the occupancy of the owner. This protects so much of the curtilage as is necessary for the reasonable enjoyment of the house, but not what is merely desirable or convenient.<sup>6</sup> Where a piece was taken from one side of a lot but access to the house and outbuildings was not interfered with, the court refused to interfere by injunction, though the right of way came within six feet of the house.<sup>7</sup> The statute does not protect a lot across the street from plaintiff's house, where he intends to erect a barn.<sup>8</sup> A house which has been hastily occupied by the owners for the apparent purpose of forcing a sale, and manifestly not in good faith, is not within the statute.<sup>9</sup> The benefit of any such statute may be waived by the owner to be affected.<sup>10</sup> In Pennsylvania

<sup>2</sup> Crowell v. Londonderry, 63 N. H. 42.

<sup>3</sup> Carter v. Moulton, 58 N. H. 64.

<sup>4</sup> Henry v. Trustees, 48 Ohio St. 172, 30 N. E. Rep. 1122.

<sup>5</sup> State v. Troth, 34 N. J. L. 377.

<sup>6</sup> Damon v. Baltimore etc. R. R. Co., 119 Pa. St. 287, 13 Atl. Rep. 217; Rudolph v. Pennsylvania S. V. R. R. Co., 166 Pa. St. 430, 31 Atl. Rep. 131.

<sup>7</sup> Stahl v. Pennsylvania Co., 155 Pa. St. 309, 26 Atl. Rep. 437; S. C. 12 Pa. Co. Ct. 375.

<sup>8</sup> Kelly v. Pennsylvania S. V. R. R. Co., 5 Mont. Co. L. R. 175.

<sup>9</sup> Hagner v. Pennsylvania S. V. R. R. Co., 154 Pa. St. 475, 25 Atl. Rep. 1082.

<sup>10</sup> Chesapeake & O. R. R. Co. v. Pack, 6 W. Va. 397.

it is held that, in the absence of any exemption of dwellings, the lay-out of a county road through a house will be quashed, when the house could be avoided by a slight curve.<sup>11</sup>

§ 282. The same continued: Other buildings and structures.—An inclined-plane railway, in use at the terminus of the plaintiff's road for the purpose of handling freight and passengers was held to be within the statutes prohibiting the taking of fixtures or erections used for trade or manufacture.<sup>12</sup> In construing such acts it has been held that a house over a spring is an out-house,<sup>13</sup> that a tail-race is not part of a mill or building,<sup>14</sup> that an engine house, belonging to a fire company is not a public building,<sup>15</sup> and that a cow-stable, wagon-shed and chicken-house are "buildings or fixtures."<sup>16</sup> A railroad was built over land without acquiring title. The owner erected a building near the track, within the limits of the right of way which the company was entitled to take; held, it was protected from condemnation the same as if there originally.<sup>17</sup> A building moved onto the line of a proposed way after application for the lay-out has been made is not protected.<sup>18</sup> Application was made for a road running through A's barn, to which he orally consented. The lay-out was refused. Pending an appeal, A sold to B, who opposed the lay-out. It was held that A's consent was no longer binding after the refusal, and the sale was a revocation.<sup>19</sup> Where the trustees of a village were prohibited from altering a street so as to run over the site of any building the expense of removing which would exceed one hundred dollars, they have no jurisdiction in a case where the expense will exceed that sum, though

<sup>11</sup> Extension of Second street, 23 Pa. St. 346.

<sup>12</sup> Mohawk & Hudson R. R. Co. v. Artcher, 6 Paige 83.

<sup>13</sup> Willoughby v. Shipman, 28 Mo. 50.

<sup>14</sup> Worthington v. Bicknell, 1 Bland, Md. 186.

<sup>15</sup> State v. Troth, 34 N. J. L. 377.

<sup>16</sup> Smart v. Hart, 75 Wis. 471, 44 N. W. Rep. 514.

<sup>17</sup> Alabama, Great Southern R. Co. v. Gilbert, 71 Ga. 591.

<sup>18</sup> Carris v. Comrs. of Waterloo, 2 Hill, 443.

<sup>19</sup> People v. Goodwin, 5 N. Y. 568.

the owner consents.<sup>20</sup> A statute which prohibited the laying out of a highway through any building, or yards or enclosures, necessary to the use thereof, was held to prevent the establishment of a road through lands acquired by a railroad company for an engine-house, turn-table and station, the last of which had been built.<sup>21</sup>

§ 283. The same continued: Gardens, orchards, yards and other enclosures or exceptions.—Under a statute prohibiting a lay-out through any building or any fixtures or erections used for trade or manufacture, or through any yards or enclosures necessary to the use thereof, a way may not be laid through a railroad yard in which are an engine-house, turn-table, etc.,<sup>22</sup> nor over a dock used for storage in connection with a ferry,<sup>23</sup> nor through a mill-yard.<sup>24</sup> The term garden does not protect land enclosed with a garden, but not used for garden purposes.<sup>25</sup> In an English case the term garden was held to include all gardens, and to apply to a tract of ten acres used for market-gardening.<sup>26</sup> The words "improved or cultivated land" are to be taken as opposed to wild land.<sup>27</sup> The term orchard protects the trees and the ground which they overhang, and as much more as is reasonably necessary for their cultivation or enjoyment.<sup>28</sup> An enclosure with two or three old fruit trees is not an orchard.<sup>29</sup> But a collection of fifteen or twenty fruit trees may constitute one.<sup>30</sup> When the taking of certain land for

<sup>20</sup> *Starr v. Rochester*, 6 Wend. 564.

<sup>21</sup> *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

<sup>22</sup> *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

<sup>23</sup> *Flanders v. Wood*, 24 Wis. 572.

<sup>24</sup> *People v. Kingman*, 24 N. Y. 599. Where the mill-yard was not enclosed or defined, it was held that it was for the commissioners to say how much was necessary. *Ibid.*

<sup>25</sup> *People v. Horton*, 8 Hun

357; *People v. Comrs. of Highways*, 57 N. Y. 549.

<sup>26</sup> *Hughes v. Trustees of Morden College*, 1 Ves. Sr. 188, 3 Ves. Sr. 105.

<sup>27</sup> *Clark v. Phelps*, 4 Cow. 190.

<sup>28</sup> *Seymour v. State*, 19 Wis. 240.

<sup>29</sup> *People ex rel. v. Judges of Dutchess County*, 23 Wend. 369; *Ballou v. Elder*, 95 Ia. 693, 64 N. W. Rep. 622.

<sup>30</sup> *Nischen v. Hawes*, (Ky.) 21 S. W. Rep. 1049.

a school site was first talked of the owner set out some fruit trees thereon. The project was abandoned and the trees neglected. Afterwards the project was renewed and more trees were set out. Held that it was not a bona fide orchard.<sup>31</sup> Prohibiting a lay-out through an orchard does not prevent passing through a field in which there is an orchard.<sup>32</sup> Where a statute prohibited a lay-out through any inclosure of one year's standing, "unless upon examination a good way cannot otherwise be had," a construction placed on this by adding the words "without departing essentially from the route petitioned for" was held to be correct.<sup>33</sup> A statute which prohibits the laying out of a road through an enclosure where there is a growing crop, does not apply where the crop was planted after the lay-out was ordered.<sup>34</sup> Where "mines of coal, iron-stone, slate or other mineral," are excepted, the exception includes ordinary clay when it has a commercial value.<sup>35</sup> A statute applicable to the construction of water works provided that, "no artificial provision made for water by any person or corporation, or owned by any person, association or body, shall be used or condemned without consent of the owner." In construing this exception the court made a distinction between a "provision made for water" and the water itself and held that it did not prevent the taking of water from a mill pond.<sup>36</sup>

§ 284. Section 92 of the English land clauses consolidation act: Meaning of "house," "building," "manufactory." —The construction of this section involves questions analogous to those considered in the last three sections. The section referred to provides "that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building, or

<sup>31</sup> Johnson v. School Trustees, 26 Grant Ch. 204.

<sup>32</sup> People v. Judges of Dutchess County, 23 Wend. 360; and see Snyder v. Plass, 28 N. Y. 465; Snyder v. Trumbour, 38 N. Y. 355.

<sup>33</sup> Cummins v. Shields, 34 Ind. 154.

<sup>34</sup> Thompson v. State, 20 Ala. 54.

<sup>35</sup> Glasgow v. Fazfe, 14 Sess. Cas. (4th Series) 346.

<sup>36</sup> Bass v. Ft. Wayne, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. & Corp. Rep. 173.

manufactory, if such party be willing and able to sell and convey the whole thereof." The term house includes whatever would pass by a conveyance<sup>37</sup> or devise<sup>38</sup> thereof. It accordingly includes the yard and gardens attached to a house and used in connection therewith.<sup>39</sup> So the words building and manufactory include whatever grounds and structures are appurtenant thereto and reasonably necessary to their proper use and enjoyment.<sup>40</sup> A company gave notice to take a dwelling and cottages all separated from a factory by a road. The cottages were used as warehouses in connection with the factory. It was held that the company could be compelled to take the factory also.<sup>41</sup> The statute applies though the house, factory or building is only commenced or a part only completed and the ground proposed to be taken is unused in connection with such part.<sup>42</sup>

§ 285. What may be taken under the term "land," "ground," etc.—The term land, in statutes conferring power to condemn, is to be taken in its legal sense, and includes

<sup>37</sup> *King v. Wycombe Ry. Co.*, 28 Beav. 104; S. C. 29 L. J. Ch. N. S. 462.

<sup>38</sup> *Steele v. Midland R. R. Co.*, L. R. 1 Ch. App. 275.

<sup>39</sup> *Cole v. West London & Crystal Pal. Ry. Co.*, 27 Beav. 242; *Alexander v. Same*, 30 Beav. 556; S. C., 31 L. J. Ch. N. S. 500; *Salter v. Metropolitan District Ry. Co.*, 39 L. J. Eq. 567; *Marson v. London, Chatham & Dover Ry. Co.*, L. R. 6 Eq. Cas. 101; S. C. 37 L. J. Ch. 483; *Steele v. Midland R. R. Co.*, L. R. 1 Ch. App. 275.

<sup>40</sup> *Furniss v. Midland Ry. Co.*, L. R. 6 Eq. Cas. 473; *Sparrow v. Oxford, Worcester & Wolverhampton Ry. Co.*, 2 DeG. M. & G. 94; *Grosvenor v. Hempstead Junction R. R. Co.*, 1 DeG. & J. 446; *Giles v. London etc. R. R. Co.*, 30 L. J. Ch. 603.

<sup>41</sup> *Spackman v. Great Western R. R. Co.*, 1 Jur. N. S. 790.

<sup>42</sup> *Cathedral of the Holy Trinity v. West Ont. Pac. R. R. Co.*, 14 Ont. 246; *Hampstead v. Junction R. R. Co.*, 1 DeG. & J. 446; *Alexander v. Crystal Palace R. R. Co.*, 30 Beav. 556, 31 L. J. Ch. 500. And, generally, on the construction of this section, see *Fergusson v. London Brighton & South Coast Ry. Co.*, 3 DeG. J. & S. 653; S. C. 33 Beav. 103, and 33 L. J. Ch. 29; *Pulling v. London, Chatham & Dover Ry. Co.*, 3 DeG. J. & S. 661; S. C. 33 Beav. 644; *Faulkner v. Somerset & Dorset Ry. Co.*, 42 L. J. Ch. 851; *Reddin v. Metropolitan Board of Works*, 31 L. J. Ch. 660; *St. Thomas Hospital v. Charing Cross Ry. Co.*, 1 J. & H. 400; *Gardner v. Same*, 2 J. & H. 248; *Pinchin v. London &*



both the soil and buildings and other structures on it,<sup>43</sup> and any and all interests therein.<sup>44</sup> An easement merely may be taken under authority to take land.<sup>45</sup> Land under water may be taken as well as any other land.<sup>46</sup> That which can only exist in connection with the land cannot be taken under a power to condemn land without taking the land itself, as the right to the flow of a stream of water.<sup>47</sup> Land includes the soil and right of support, and under a general power to take land a right to use the soil above or below the surface cannot be taken without taking the right of support of the soil used.<sup>48</sup> The term ground in such statutes means the same as land and includes buildings.<sup>49</sup>

§ 286. Designating the property to be taken.—This is a matter which rests wholly with the legislature.<sup>50</sup> The legislature may designate the particular property to be taken,<sup>51</sup> or this may be left to the discretion of those upon whom the

Blackwall Ry. Co., 5 DeG. McN. & G. 851; *Stone v. Commercial Ry. Co.*, 9 Sim. 621; *Walker v. London & Blackwall Ry. Co.*, 3 A. & E. N. S. 744; 43 E. C. L. R. R. 954; *Queen v. London & Greenwich Ry. Co.*, 3 A. & E. N. S. 166, 43 E. C. L. R. R. 681; and see also *Lloyd's Compensation*, pp. 18 to 27, where this subject is treated.

<sup>43</sup> *Brocket v. Ohio & Pennsylvania R. R. Co.*, 14 Pa. St. 241; *State v. Reed*, 38 N. H. 59.

<sup>44</sup> *Philadelphia etc. R. R. Co. v. Williams*, 54 Pa. St. 103.

<sup>45</sup> *Googins v. Boston & A. R. R. Co.*, 155 Mass. 505, 30 N. E. Rep. 71; *Leitzsey v. Columbia Water Power Co.*, 47 S. C. 464.

<sup>46</sup> *Matter of New York Central & Hudson River R. R. Co.*, 77 N. Y. 248.

<sup>47</sup> *Watson v. Acquackanonck Water Co.*, 36 N. J. L. 195. But

under authority to take water rights a prescriptive right to foul the waters of a brook may be taken without taking any land. *Martin v. Gleason*, 139 Mass. 183.

<sup>48</sup> *DeCamp v. Hibernia Underground R. R. Co.*, 47 N. J. L. 43; S. C. *Ibid.* 518.

<sup>49</sup> *Ferree v. Sixth Ward School District*, 76 Pa. St. 376.

<sup>50</sup> *Matter of Union Ferry Co.*, 98 N. Y. 139; *Warren v. First Division of the St. Paul & Pacific R. R. Co.*, 18 Minn. 384.

<sup>51</sup> *Genet v. Brooklyn*, 99 N. Y. 296; *Matter of Application of Mayor etc. of New York*, 34 Hun 441; 99 N. Y. 569; *Matter of Union Ferry Co.*, 98 N. Y. 139; *Mahoney v. Comry*, 103 Pa. St. 362; *Haverhill Bridge Proprietors v. County Comrs. of Essex*, 103 Mass. 120; *Northampton Bridge Case*, 116 Mass. 442.

authority is conferred, with or without limitations.<sup>52</sup> In the absence of any statutory provision the particular route to be followed between designated points in case of a railroad or similar way, rests in the discretion of the company.<sup>53</sup>

§ 287. What may be taken under particular statutes.— We have already treated of this subject in the last chapter, in considering the construction of particular statutes.<sup>54</sup> Numerous examples of the construction of particular statutes will also be found in the preceding sections of this chapter, and a few additional cases are here referred to. A statute that telegraph companies may construct their lines "along and parallel to any of the railroads of the State," does not authorize a condemnation along and upon the right of way of a railroad company.<sup>55</sup> Power to condemn land for a site for a court house is power to condemn for part of the site, adjacent to land already owned by the county.<sup>56</sup> Authority to canal commissioners to enter upon lands contiguous to the canal and works connected therewith for the purpose of getting materials, was held to justify an entry upon a ledge of rock sixty rods away from the canal.<sup>57</sup> An act provided that a company could prevent the working of minerals within ten yards of its canal by making compensation. It was held that the company could prevent the working of minerals at a greater distance, if necessary, upon the same terms.<sup>58</sup> A street may be laid out over tide lands lawfully filled in below highwater mark.<sup>59</sup> A company cannot condemn property outside of

<sup>52</sup> DeWitt v. Duncan, 46 Cal. 342; Boston Water Power Co. v. Boston & Worcester R. R. Co., 23 Pick. 360; Supervisors of Culpeper v. Gorrell, 20 Gratt. 484.

<sup>53</sup> Southern Minn. R. R. Co. v. Stoddard, 6 Minn. 150; Norton v. Walkill Valley R. R. Co., 61 Barb. 476; Walker v. Mad River etc. R. R. Co., 8 Ohio, 38; and see generally ante, §§ 237 et seq.

<sup>54</sup> Ante, §§ 256 et seq.

<sup>55</sup> Postal Tel. Cable Co. v. Norfolk & W. R. R. Co., 88 Va. 920, 14 S. E. Rep. 803.

<sup>56</sup> Jockheck v. Board of Comrs. 53 Kan. 780, 37 Pac. Rep. 621.

<sup>57</sup> Jerome v. Ross, 7 Johns. Ch. 315.

<sup>58</sup> Midland R. R. Co. v. Checkley, 26 L. J. Ch. 380, L. R. 4 Eq. 19.

<sup>59</sup> Henshaw v. Hunting, 1 Gray 203.

its location.<sup>60</sup> Under power to open, lay out, widen, straighten or to otherwise change streets a city may condemn the right of a corporation to maintain bridges across a street.<sup>61</sup> Authority to a railroad company to construct its lines across, along or on any river, stream or water course, which its route should intersect or touch, was held to exclude tide lands belonging to the State.<sup>62</sup> It has been held that proceedings cannot be instituted to condemn a mortgagee's interest,<sup>63</sup> but this would not be true in most States;<sup>64</sup> also that they cannot be had for the purpose of quieting title to land claimed by the petitioner.<sup>65</sup> Under authority to take land and rights in land the right may be acquired to permanently raise land to a certain grade, without taking the fee.<sup>66</sup> Power to alter the location of a highway to avoid a grade-crossing is power to widen the highway.<sup>67</sup> Where a grade-crossing has been abolished by changing a highway, the old crossing cannot be restored under the guise of laying out a new highway.<sup>68</sup> It has been held, construing particular statutes, that the right to pollute a stream with sewerage could be condemned,<sup>69</sup> also the right to inflict a nuisance upon property by means of noise, smoke, vibrations, etc.<sup>70</sup>

<sup>60</sup> *Tudor v. Chicago etc. R. R. Co.*, (Ill.) 27 N. E. Rep. 915.

<sup>61</sup> *Trustees v. City of Atlanta*, 93 Ga. 468, 21 S. E. Rep. 74.

<sup>62</sup> *Seattle etc. R. R. Co. v. State*, 7 Wash. 150, 34 Pac. Rep. 551.

<sup>63</sup> *Chicago etc. R. R. Co. v. Reed*, 2 Kan. App. 492, 43 Pac. Rep. 997.

<sup>64</sup> *Post*, § 324.

<sup>65</sup> *Florence etc. R. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. Rep. 857.

<sup>66</sup> *Barnett v. Commonwealth*, 169 Mass. 417.

<sup>67</sup> *New England R. R. Co. v. Board of Comrs.*, 171 Mass. 135, 50 N. E. Rep. 549.

<sup>68</sup> *New Haven etc. R. R. Co. v. County Comrs.*, 173 Mass. 12.

<sup>69</sup> *Long v. Emporia*, 59 Kan. 45.

<sup>70</sup> *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323, 54 N. E. Rep. 57.





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